



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

January 24, 2014

OAG-01-14

Mr. David L. Grindell
Corporation Counsel
Burnett County
7410 County Road K, #121
Siren, WI 54872

Dear Mr. Grindell:

¶ 1. You asked two questions relating to the intersection of land division and zoning regulation: (1) whether a circuit court judgment dividing land can override the minimum lot size requirements of a county zoning ordinance; and (2) whether a county may enact an ordinance or regulation requiring prior review of sales or exchanges of land between adjoining landowners in order to assure that such sales or exchanges satisfy minimum lot size requirements.

¶ 2. In my opinion, the exception in the subdivision law for transfers of land “by will or pursuant to court order” does not override applicable zoning regulations. Zoning ordinances continue to apply following a court-ordered division, and the court should consider such ordinances in determining whether partition would be appropriate. A county has the authority to enact an ordinance providing for review of proposed sales or exchanges between adjoining landowners to determine whether the resulting lots would be reduced below the minimum lot size required by zoning or other regulations. The county may impose a reasonable fee for this review.

¶ 3. Your first question relates to the applicability of Burnett County’s minimum lot size zoning ordinance to land divided by a circuit court judgment. Burnett County’s zoning ordinance mandates that all lots in its shoreland zoning district have a minimum width of 150 feet, a minimum depth of 200 feet, a minimum area of at least 30,000 square feet, and a minimum setback of at least 75 feet from navigable waters. With respect to property abutting navigable waters, section 4.4(6)(a) of the ordinance provides that “no lot area shall be so reduced that the dimensional and yard requirements required by this ordinance cannot be met.”

¶ 4. You advise that property owners in the shoreland zoning district have commenced partition actions against co-owners of the same property, apparently for the purpose of evading these requirements. For example, one co-owner of a conforming 150-foot wide parcel may commence a partition action against the other, obtaining an unopposed judgment that divides the parcel into two, separately-owned 75-foot wide parcels. You indicate that a similar issue may

arise in probate proceedings when a parcel is divided among legatees under a will; you write that such probate divisions are not necessarily collusive. You state that the owners assert that the new parcels are exempt from the zoning ordinance by virtue of Wis. Stat. § 236.45(2)(am), which prohibits municipalities from using their subdivision authority to control divisions of land into less than five parcels that are “[t]ransfer[red] . . . by will or pursuant to court order[.]” Wis. Stat. § 236.45(2)(am)1.

¶ 5. Your question raises the threshold issue of whether a judgment in a partition action, which terminates a co-tenant’s undivided interest in the whole of the property, is a “transfer” within the meaning of Wis. Stat. § 236.45(2)(am). We need not reach that issue, however, because even assuming that a judgment in a partition action may be a “transfer” under that provision, that statute would not override applicable zoning ordinances. Zoning ordinances would continue to apply following the creation of any new parcel, and their effect on any proposed new parcel would be relevant in a judicial proceeding to determine whether partition is appropriate.

¶ 6. Minimum lot size is subject to regulation both through a municipality’s subdivision authority and through the enactment of zoning ordinances by a zoning authority. “Minimum lot size . . . is an area of shared power that may be regulated by a municipality through its authority under ch. 236, or through the enactment of zoning ordinances by the applicable zoning authority.” *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 172, 558 N.W.2d 100 (1997). Zoning regulations and subdivision controls are authorized by separate enabling acts that may differ in their requirements for enactment of regulations and their procedure for enforcement or relief. *Id.* at 173.

¶ 7. Subdivision controls are authorized under Wis. Stat. ch. 236, and the exemption under Wis. Stat. § 236.45(2)(am) applies to regulation under that chapter. Counties, however, also possess zoning and shoreland zoning authority under Wis. Stat. §§ 59.69 and 59.692, powers “liberally construed in favor of the county exercising them[.]” Wis. Stat. § 59.69(13); Wis. Stat. § 59.692(2)(a).

¶ 8. For shoreland zoning, counties must zone all shorelands in their unincorporated area, and the ordinance must meet the minimum zoning standards provided for in Wis. Admin. Code ch. NR 115. Wis. Stat. § 59.692(1m) and (6). Those standards require county shoreland zoning ordinances to provide for unsewered lots to have a minimum width of at least 100 feet, a minimum area of at least 20,000 square feet, and a minimum setback of at least 75 feet from navigable waters. Wis. Admin. Code § NR 115.05(1)(a)2., (b)1. Burnett County enacted its shoreland zoning ordinance pursuant to this statutory authority.

¶ 9. Where a county acts pursuant to its zoning authority in regulating minimum lot size, the exemption to a municipality’s subdivision authority in Wis. Stat. § 236.45(2)(am) is inapplicable. Even if a division or transfer is exempted from the subdivision law, zoning

regulations continue to apply. *Friend v. Friend*, 964 P.2d 1219, 1222 (Wash. App. 1998); *Leake v. Casati*, 363 S.E.2d 924, 927-28 (Va. 1988); cf. OAG 2-97 (December 8, 1997) (discussing similar considerations with respect to nonconforming uses in shoreland zoning districts). In *Leake*, the Virginia Supreme Court held that the trial court was not prevented by that state's subdivision law from partitioning land. The court concluded that it was unlikely that a court would do so, however, because zoning regulations continued to apply:

Even though the court's power to order a division of land is unaffected by a subdivision ordinance, it does not follow that those who become owners of the resulting parcels will be immune to valid laws regulating land *use*.

Leake concedes, and we agree, that zoning and other valid land-use ordinances and statutes continue to apply to partitioned land. Thus, for example, while it would be within the court's power to partition land into parcels too small to meet the minimum lot size required by a zoning ordinance, the ordinance would prohibit any effective *use* of such lots after the division had been made. Thus, it is unlikely that the court would find such a division "convenient," or, indeed, that any party litigant would seek such a division.

Leake, 363 S.E.2d at 927-28 (emphasis in original). Similarly, in probate actions in which courts have held that a testamentary devise succeeds regardless of the resulting parcel's compliance with zoning laws, zoning laws nonetheless apply following the probate court's judgment. *Estate of Hunt*, 990 A.2d 544, 547 (Me. 2010) (collecting cases).

¶ 10. Where a court is asked to divide property in a partition or probate action, zoning regulations will apply to any parcels created by the court's judgment. As a result, courts have agreed that applicable zoning regulations should be considered in evaluating whether partition by division would be "convenient" or can be accomplished without great prejudice to the parties. *Withers v. Jepsen*, 246 P.3d 1215, 1217 (Utah App. 2011); *Friend*, 964 P.2d at 1222; *Bellnier v. Bellnier*, 158 A.D.2d 947, 948 (N.Y. App. 1990); *Leake*, 363 S.E.2d at 927-28.

¶ 11. Further, if a trial court becomes aware that a lawsuit was brought to evade the subdivision or zoning law, it may decline to partition the property or vacate an earlier judgment of partition. *Mount Laurel Township v. Barbieri*, 376 A.2d 541, 545-46 (N.J. Super. 1977) (vacating partition sought in order to evade subdivision control and concluding that non-adversarial proceedings fell outside the exception for court-ordered divisions: "To hold otherwise would make a mockery of the municipal subdivision statute."); *Pratt v. Adams*, 40 Cal. Rptr. 505, 508 (Cal. App. 1964) (landowners who commenced a partition action for the purpose of circumventing the subdivision statutes were subject to those statutes because they, not the court, caused the creation of new parcels). No Wisconsin case has construed the exception in Wis. Stat. § 236.45(2)(am) for property "[t]ransfer[red] . . . pursuant to court order[.]" Partition, however, is an equitable action. *O'Connell v. O'Connell*, 2005 WI App 51, ¶ 8,

279 Wis. 2d 406, 694 N.W.2d 429. Whether to award equitable relief is within the trial court's discretion. *Prince v. Bryant*, 87 Wis. 2d 662, 674, 275 N.W.2d 676 (1979). A court might conclude that partition sought for the purpose of evading local subdivision regulations is inequitable and should be denied.

¶ 12. If property owners were able to obtain partition, despite these principles, they might seek a hardship-based zoning variance. Because such a hardship would be self-created, it would not be an appropriate candidate for a variance. A self-created hardship or practical difficulty cannot qualify as a basis for a grant of a variance. *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶ 7, 269 Wis. 2d 549, 676 N.W.2d 401 (reaffirming *Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 476, 479, 247 N.W.2d 98 (1976)). The same principle would apply to a subsequent transferee. If a zoning board did grant a variance in such a case, the Department of Natural Resources or other aggrieved parties could challenge the variance in circuit court. *State ex rel. Dep't of Natural Res. v. Walworth Cnty. Bd. of Adjustment*, 170 Wis. 2d 406, 412, 489 N.W.2d 631 (Ct. App. 1992).

¶ 13. Your second question involves all conveyances between adjoining property owners. You ask whether a county can require prior review of sales or exchanges of parcels between adjoining landowners and impose a reasonable review fee in order to assure that a proposed transfer or exchange complies with minimum lot size requirements. You advise that the county is normally not informed when adjoining landowners transfer or exchange land in a way that creates substandard lots, and that the county might not discover until years later that a substandard lot has been created.

¶ 14. Wisconsin Stat. § 236.45(2)(am) authorizes municipalities, towns, and counties to enact subdivision ordinances that impose "approving requirements" for divisions of land into less than five parcels. The statute exempts sale or exchange of parcels between owners of adjoining property from such regulation, but only if additional lots are not thereby created and the resulting lots are not reduced below the minimum sizes required by applicable laws or ordinances. Wis. Stat. § 236.45(2)(am)3. Such an ordinance thus could require preapproval of a proposed transfer, division, or exchange between owners of adjoining property if it would create one or more additional lots or if the newly-created lots would fail to comply with applicable zoning regulations.

¶ 15. A county must have the ability to review the proposed sale or exchange in order to determine whether it would come within the exception in Wis. Stat. § 236.45(1)(am)3. In *Town of Clearfield v. Cushman*, 150 Wis. 2d 10, 20-21, 440 N.W.2d 777 (1989), the Wisconsin Supreme Court held that a town had the authority to require building permits because permitting allowed the town to fulfill its statutory responsibilities: "[W]hen specific duties are intrusted to [towns] and made obligatory on their part, it must be assumed that it was the legislative intent to give them ample authority to carry out those duties." *Cushman*, 150 Wis. 2d at 21 (quotations

Mr. David L. Grindell
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and citations omitted). Wisconsin Stat. § 236.45(2)(am) and (2)(am)3. allow counties to prohibit sales or exchanges between owners of adjoining property that result in lots smaller than the minimum lot size regulations require. That grant of authority is sufficient to permit counties to review proposed sales or exchanges of property to determine whether they would meet those requirements.

¶ 16. You also ask if a fee may be imposed to offset all or part of the cost of such a limited review. A reasonable regulatory fee may be imposed to defray costs incurred in connection with the review process. *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶¶ 9, 15, 298 Wis. 2d 407, 727 N.W.2d 358 (2006).

¶ 17. I conclude that a county's minimum lot size zoning ordinance applies to parcels created by a court through division in a partition or probate action, even if such division would be exempted from a municipality's subdivision authority under Wis. Stat. § 236.45(2)(am)1. I further conclude that a county can enact a subdivision ordinance requiring prior review of sales or exchanges of parcels between adjoining landowners in order to determine whether the division would comply with minimum lot size requirements. The county may impose a reasonable fee therefor.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

May 30, 2014

OAG-02-14

Mark Gottlieb, P.E.
Secretary
Department of Transportation
4802 Sheboygan Avenue, Room 120B
Madison, WI 53705

Dear Mr. Gottlieb:

¶ 1. Wisconsin Stat. §§ 343.30(1q) and 343.305 authorize the revocation of a person's operating privilege following a conviction for operating a vehicle under the influence of intoxicants or refusal to submit to a test for intoxication, respectively. The Department of Transportation ("DOT") may revoke the offender's operating privilege if a court fails to do so. Wis. Stat. §§ 343.30(1q)(f) and 343.305(10)(f). You ask which convictions DOT should count in making this determination.

¶ 2. Specifically, you ask whether a conviction that has been collaterally attacked for criminal sentencing purposes should be disregarded by DOT in determining whether to revoke the offender's operating privilege. An offender may challenge, or "collaterally attack," the use of a conviction for purposes of calculating a sentence for a new criminal conviction.

¶ 3. I conclude that DOT must count these convictions. The statutes require DOT to maintain a permanent record of all unvacated convictions and use that record to calculate revocations. A conviction that has been collaterally attacked remains on the record. It is irrelevant that the offender may have a right to have the conviction disregarded for criminal sentencing: the revocation of operating privileges is a civil, not a criminal, consequence.

¶ 4. In providing for license revocation, the Legislature has provided no statutory exception to exclude a conviction based on a collateral attack. The statutes mandate that specific prior convictions, suspensions, or revocations be counted. Wis. Stat. § 343.307(1) ("The court *shall* count the following . . .")(emphasis added). The statute defines "conviction" as including any "unvacated adjudication of guilt. . . ." Wis. Stat. § 340.01(9r). Even a conviction that has been expunged continues to be listed in DOT's records under Wis. Stat. § 343.23(2)(a). Wis. Stat. § 973.015(1m)(a). DOT must permanently maintain a record of those suspensions, revocations, and convictions for use in determining whether to revoke:

[S]o that the complete operator's record is available for the use of the secretary in determining whether operating privileges of such person shall be suspended, revoked, canceled, or withheld, or the person disqualified, in the interest of public safety. The record of suspensions, revocations, and convictions that would be counted under s. 343.307(2) shall be maintained permanently.

Wis. Stat. § 343.23(2)(b).

¶ 5. A conviction that has been collaterally attacked meets the definition of "conviction" under Wis. Stat. § 340.01(9r) because a collateral attack does not overturn or vacate the conviction. Instead, it attempts to avoid the conviction's force of law in a subsequent criminal proceeding. *State v. Sorenson*, 2002 WI 78, ¶ 35, 254 Wis. 2d 54, 646 N.W.2d 354. Thus, as long as the adjudication of guilt is unvacated, the conviction remains on DOT's records and should be counted in determining whether to revoke the offender's operating privilege.

¶ 6. No constitutional principle alters the analysis. As you note, a defendant may challenge the effect of a previous conviction for purposes of criminal sentencing on the grounds that it was obtained in violation of the Sixth Amendment's right to counsel in criminal proceedings. *Custis v. United States*, 511 U.S. 485, 495-96 (1994); *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *State v. Ernst*, 2005 WI 107, ¶ 22, 283 Wis. 2d 300, 699 N.W.2d 92. That principle is inapplicable to the revocation of operating privileges because revocation is a civil, not a criminal, consequence.

¶ 7. The Sixth Amendment does not prohibit the use of an uncounseled conviction for all purposes. In *Lewis v. United States*, 445 U.S. 55 (1980), the U.S. Supreme Court held that a federal prohibition on firearms possession could permissibly be based on a conviction obtained in violation of the Sixth Amendment. The Court reasoned that the Sixth Amendment was not a barrier to considering such a conviction because the statute's consequence was essentially civil:

Use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction, is not inconsistent with *Burgett*, *Tucker*, and *Loper*. In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. . . . Enforcement of that essentially civil disability through a criminal sanction does not "support guilt or enhance punishment," see *Burgett*, 389 U.S., at 115, 88 S. Ct., at 262

Lewis, 445 U.S. at 67.

¶ 8. Wisconsin case law also limits the application of collateral attacks to circumstances in which the prior conviction would be used to support guilt or enhance a criminal penalty, not those in which the consequences are civil. The basic distinction has been repeatedly stated by the Wisconsin Supreme Court:

A defendant may, in a subsequent proceeding, collaterally attack a prior conviction obtained in violation of the defendant's right to counsel if the prior conviction is used to support guilt or enhance punishment for another offense. A defendant may not, in a subsequent proceeding, collaterally attack a prior conviction if the prior conviction is used to identify the defendant as a member of a potentially dangerous class of individuals.

State v. Foust, 214 Wis. 2d 568, 572, 570 N.W.2d 905 (Ct. App. 1997) (quoting *State v. Baker*, 169 Wis. 2d 49, 59-60, 485 N.W.2d 237 (1992)).

¶ 9. The revocation of operating privileges falls into the second category. "When the state revokes a person's license, the state thereby identifies and classifies that person as a potentially dangerous individual who should not drive a motor vehicle and alerts that person to this status." *Baker*, 169 Wis. 2d at 64 (footnote omitted). Unlike the use of a conviction to support guilt or enhance a punishment for a subsequent offense, its use to calculate the revocation of operating privileges results in no criminal penalty and is not punishment for the offense. It simply determines who is licensed to drive, which serves the purpose of protecting public safety on the roadways:

The automobile of today, with engineering emphasis on power and speed, can be a crippling and potentially lethal weapon in the hands of an irresponsible driver. Licensing helps to assure safe drivers and also provide a good record-keeping system for identifying irresponsible drivers.

County of Fond du Lac v. Derksen, 2002 WI App 160, ¶ 8, 256 Wis. 2d 490, 647 N.W.2d 922 (citation omitted). The constitutional principle underlying a collateral attack, which arises when criminal consequences are at stake, thus does not apply to the revocation of a driver's license.

¶ 10. Courts in other jurisdictions have held consistently that an individual may not collaterally attack the validity of a prior conviction for purposes of the state's revocation of operating privileges. In *Broadwell v. Michigan Department of State*, 539 N.W.2d 585, (Mich. Ct. App. 1995), the Michigan court of appeals held that the state licensing agency could not disregard a conviction that had been collaterally attacked in the course of a criminal proceeding. The court concluded:

[D]river's license revocation is mandatory, and a prior [operating under the influence of liquor] conviction that is determined to be constitutionally infirm on collateral attack can form the basis for the administrative action of revoking a person's driving privileges.

Broadwell, 539 N.W.2d at 587 (citation omitted).

¶ 11. In the context of revocations determined in administrative proceedings, other courts have agreed that the state should disregard collateral attacks on previous convictions. *See, e.g., Ray v. Dep't of Transp.*, 821 A.2d 1275, 1278 (Pa. Commw. Ct. 2003); *Commonwealth v. Duffey*, 639 A.2d 1174, 1177 (Pa. 1994) ("[T]he scope of review of an operating privilege suspension which resulted from a criminal conviction does not include the authority to attack the validity of the underlying criminal conviction."); *State v. Laughlin*, 634 P.2d 49, 51 (Colo. 1981) (distinguishing criminal habitual traffic offender cases, in which a constitutional challenge to an underlying conviction may be mounted, from a driver's license revocation proceeding, where it may not). These courts have concluded that a collateral attack on a prior conviction is irrelevant for license revocation purposes because revocation is not a criminal sanction. A licensee's recourse is not a collateral attack, but rather a post-conviction remedy to vacate the criminal judgment. *Ray*, 821 A.2d at 1278; *Laughlin*, 634 P.2d at 51.

¶ 12. I conclude that, unless a conviction has been vacated, DOT must count convictions that have been collaterally attacked when it determines whether to revoke an individual's operating privilege.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBV:CJG:CJB:alc



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

July 10, 2014

OAG-03-14

Mr. Kevin J. Kennedy
Director and General Counsel
Government Accountability Board
212 East Washington Avenue, Third Floor
Madison, WI 53703

Dear Mr. Kennedy:

¶ 1. You have requested an opinion regarding the ability of the Government Accountability Board ("GAB") to provide investigative records that are confidential under Wis. Stat. § 12.13(5) to the Legislative Audit Bureau ("LAB") for purposes of an audit of GAB's operations as directed by the Joint Legislative Audit Committee.

¶ 2. I conclude that Wis. Stat. § 12.13(5) prohibits GAB from providing confidential investigative records to LAB for purposes of an audit of GAB's operations directed by the Joint Legislative Audit Committee. Wisconsin Stat. § 12.13(5) prohibits disclosure of GAB's investigative records except for disclosures that are "specifically authorized by law." I conclude that Wis. Stat. § 13.94, which provides that LAB "shall at all times and with or without notice have access to all departments and to any books, records, or other documents maintained by the department," is not a specific authorization that would permit GAB to disclose its confidential investigative records to LAB.

¶ 3. Wisconsin Stat. § 12.13(5) provides:

[e]xcept as *specifically* authorized by law and except as provided in par. (b), no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board may disclose information related to an investigation or prosecution under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 or any other law specified in s. 978.05 (1) or (2) or provide access to any record of the investigator, prosecutor, or the board that is not subject to access under s. 5.05 (5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board prior to presentation of the information or record in a court of law.

Wis. Stat. § 12.13(5)(a) (emphasis added). A violation of this provision is punishable by a fine of up to \$10,000, imprisonment of up to 9 months, or both. Wis. Stat. § 12.60(1)(bm).

¶ 4. I begin with the plain language of the statute because “statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specifically-defined words or phrases are given their technical or special definitional meaning.” *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations and quotation marks omitted). In reviewing the plain language of the statute, the “statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*, ¶ 46 (citations and quotation marks omitted). In addition, “[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *Id.* Further, Wisconsin courts recognize that “exceptions should be strictly construed.” *Lang v. Lang*, 161 Wis. 2d 210, 224, 467 N.W.2d 772, 777 (1991).

¶ 5. The use of the word “specifically” in Wis. Stat. § 12.13(5)(a) is significant because the Wisconsin statutes use the phrase “authorized by law” without the modifier “specifically,” including those related to confidentiality of documents. *See, e.g.*, Wis. Stat. § 977.09 (documents maintained by the office of the state public defender “shall not be open to inspection by any person unless authorized by law”). In order to give meaning to the word “specifically” in the phrase “specifically authorized by law,” courts recognize that the inclusion of “[t]he term ‘specifically’ indicates a legislative intent to require a certain degree of specificity or particularity in the authorization.” *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 38 (Ill. 2005).

¶ 6. There is nothing particular about LAB’s authorization to inspect records as it relates to accessing investigatory information. Wisconsin Stat. § 13.94 provides LAB with a general right to obtain documents from state departments like GAB. The statute provides that “the state auditor [the head of LAB] or designated employees shall at all times with or without notice have access to all departments and to any books, records or other documents maintained by the departments and relating to their expenditures, revenues, operations and structure except as provided in sub. (4)[.]” Wis. Stat. § 13.94. Wisconsin Stat. § 13.94(4)(a) broadly defines “department” as “[e]very state department, board, examining board, affiliated credentialing board, commission, independent agency, council or office in the executive branch of state government; all bodies created by the legislature in the legislative or judicial branch of state government.” The statute does not specifically address the GAB, Wisconsin Stat. § 12.13(5), or even explicitly grant LAB the general right to obtain documents made confidential by other statutory sections. These general powers and duties do not satisfy a common, ordinary understanding of “specific[] authoriz[ation].”

¶ 7. Viewing the powers and duties of LAB in related statutory contexts confirms this conclusion. The legislature *has* provided specific authorization for LAB to obtain confidential information in other sections of the Wisconsin statutes. For example, Wis. Stat. § 71.78 prohibits the disclosure of information derived from tax returns except for a number of specific

exceptions, including one for disclosures to “[t]he state auditor and the employees of the legislative audit bureau to the extent necessary for the bureau to carry out its duties under s. 13.94.” Wis. Stat. § 71.78(4)(s). The legislature has also specifically authorized state agencies to disclose certain confidential information to other state agencies, which would include LAB. For example, information provided to the department of administration in an energy alert must be kept confidential, but such information “may be disclosed to agencies of the state or federal government, under the same or similar rules of confidentiality.” Wis. Stat. § 16.955. Similarly, the legislature provides for the confidentiality of certain information relating to veterans but recognizes an exception when the information is furnished for use “for official purposes . . . by any agency of this state” Wis. Stat. § 45.04(8). These statutory provisions demonstrate the type of specific authorizations that would satisfy Wis. Stat. § 12.13(5).

¶ 8. The fact that the legislature specifically authorized GAB to disclose investigatory information to entities other than LAB and for purposes other than auditing further confirms that the legislature did not intend to give the LAB access to this investigatory information. Wisconsin Stat. § 12.13(5)(b) carves out the multiple exceptions to the prohibition against disclosing investigatory information. GAB has a privilege to disclose the investigatory information “in the normal course of an investigation or prosecution,” the privilege to disclose the investigatory information to any “local, state, or federal law enforcement or prosecutorial authority,” and the privilege to disclose the investigatory information to a subject of the investigation, the subject’s attorney, and the board’s attorney. Wis. Stat. § 12.13(5)(b)1.-3.

¶ 9. In addition, Wis. Stat. § 5.05(5s) authorizes others to inspect certain GAB records relating to investigations in other contexts. These include materials considered by the GAB in open session; records made public in the course of a prosecution that results from a GAB investigation; and all investigatory records pertaining to a person whom GAB is prosecuting in a civil enforcement action and who has asked GAB to make those records available. Wis. Stat. § 5.05(5s)(a), (b) & (d). GAB must also provide to the Department of Children and Families and county child support agencies “all investigative and hearing records that pertain[] to the location of individuals and assets of individuals” as those entities carry out certain statutory administrative duties relating to public assistance and child support programs. Wis. Stat. § 5.05(5s)(c). Moreover, Wis. Stat. § 5.05(5s)(e) authorizes certain investigatory records to be available for inspection under the public records law: any record of an action of the board authorizing the filing of a civil complaint; any record of an action of the board referring a matter to a district attorney or other prosecutor for investigation or prosecution; any record containing a finding that a complaint does not establish reasonable suspicion that a violation of law has occurred; and any record containing a post-investigation finding that no probable cause exists to believe that a violation of the law has occurred.

¶ 10. In sum, the legislature created numerous specific instances in which GAB must produce generally confidential investigative records, but it did not do so with respect to LAB.

¶ 11. Finally, the Legislature emphasized the importance of the confidentiality provision not only by mandating that any disclosures be specifically authorized, but also by imposing criminal penalties for any unauthorized disclosures. Other state courts recognize that “[b]y mandating a criminal penalty when a state employee violates the confidentiality requirements . . . , the Legislature emphasized the importance of the confidentiality provisions.” *Daily Gazette Co., Inc. v. Caryl*, 380 S.E.2d 209, 213 (W. Va. 1989). By imposing criminal penalties for a violation of Wis. Stat. § 12.13(5), the legislature emphasized the confidentiality of GAB’s investigative records even more than in most other statutes addressing confidentiality. It is hard to imagine a more powerful way of saying “and we really mean what we say about confidentiality” than imposing criminal penalties for improper disclosure.

¶ 12. I recognize that opinions from my predecessors have recognized the LAB’s power to access records in other contexts. But these opinions are easily distinguishable. Both the specific language of Wis. Stat. § 12.13(5) and its imposition of criminal penalties distinguish this issue from prior opinions of the attorney general relied upon by LAB. The first opinion, 74 Op. Att’y Gen. 14 (1985), examined whether a department could withhold a settlement agreement from LAB based on a contractual pledge of confidentiality and concluded that Wis. Stat. § 13.94 would permit LAB to access those documents. The opinion reasoned that “[t]he nature of the state auditor’s role is such that he or she must have access to all pertinent records including those that may otherwise be confidential.” 74 Op. Att’y Gen. at 17. While this opinion correctly interprets the law with respect to documents made confidential by contract, it does not determine whether LAB may have access to documents made confidential by statute. That question must be determined by the language of the statute at issue, and, as examined above, Wis. Stat. § 12.13(5) requires more for disclosure than a general policy that LAB should have access to confidential documents.

¶ 13. The second opinion, 57 Op. Att’y Gen. 187 (1968), also does not apply. In that opinion, the Attorney General concluded that the state health officer could share the identity of individuals who died in automobile accidents with the Department of Transportation for use in the study of alcohol as a cause of motor vehicle accidents. The Wisconsin statute at issue directed the state board of health to keep a record of the blood alcohol content of persons who died in automobile accidents to be used for statistical purposes only, and provided that the board would disclose the cumulative results to the public, but without identifying the individuals. 57 Op. Att’y Gen. at 188-89. The statute allowed the state board of health to keep the records for statistical purposes and did not affirmatively prohibit disclosure to another state agency; it merely prohibited the disclosure of the identities to the public. *See id.* The opinion reasoned that the identity of the individuals could be shared because, while this information was to be kept confidential from the general public, it “does not mean that such records may not be made available for proper purposes to other officers of government.” *Id.* at 189. This reasoning cannot be applied here because Wis. Stat. § 12.13(5) explicitly prohibits disclosure of confidential investigatory information unless it has been “specifically authorized by law” and imposes criminal penalties including a prison sentence and/or a substantial fine. Moreover, the

Mr. Kevin J. Kennedy
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legislature specifically authorized some government entities to have access to these records for certain purposes (for example, prosecutors, law enforcement, the Department of Children and Families); the Legislature's silence as to other government entities is indicative of an intent for confidentiality to apply to those other government entities.

¶ 14. I conclude that Wis. Stat. § 12.13(5) prevents GAB from providing its investigative records to LAB because such a disclosure is not "specifically authorized by law."

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBV:BPK:mlk



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

July 10, 2014

OAG-04-14

Mr. Tomas Stafford
General Counsel
University of Wisconsin System
1852 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

Ms. Janet Jenkins
Chief Legal Counsel
Department of Public Instruction
125 South Webster Street
Madison, WI 53703

Dear Mr. Stafford & Ms. Jenkins:

¶1. You inquire, in your respective capacities as General Counsel of the University of Wisconsin System ("UWS") and Chief Legal Counsel of the Department of Public Instruction ("DPI"), about the impact of 2013 Wisconsin Act 20's creation of a new "course options" provision under Wis. Stat. § 118.52. Specifically, you ask about its effect on the long-standing practice of concurrent enrollment, a program UWS calls "College Credit in High School." This program enables high school students to take college-level courses at their schools that qualify for college credit. The courses are taught by a high school teacher who is classified as an adjunct instructor of the UWS institution offering the course. The teacher conducts the course under the supervision of that institution. A student taking the course is enrolled in the UWS as a special student. You ask whether concurrent enrollment classes come within the ambit of the new course options provision.

¶2. I conclude that revised Wis. Stat. § 118.52 applies to concurrent enrollment classes. The statute applies when a high school student "attends an educational institution [including the University of Wisconsin System] for the purpose of taking a course offered by the educational institution." Wis. Stat. § 118.52(1)(am), (2). Based on the description of the concurrent enrollment program provided by UWS and DPI, I find that a student participating in

concurrent enrollment classes attends UWS for the purpose of taking a course offered by that educational institution.¹

¶3. 2013 Wisconsin Act 20 amended Wis. Stat. § 118.52. Prior to its amendment, the statute was titled “Part-time open enrollment.” It set forth the rules under which public school pupils could attend classes in a “Nonresident school district” on a part-time basis. Wis. Stat. § 118.52(2) (2011-12). A “Nonresident school district” was (and still is) defined as “a school district, other than a pupil’s resident school district, in which the pupil is attending a course or has applied to attend a course under this section.” *Id.* at § 118.52(1)(b). The statute did not address concurrent enrollment courses, or any other course a student might take at or through UWS.

¶4. With the enactment of 2013 Wisconsin Act 20, Wis. Stat. §118.52 was retitled “Course options.” Revised Wis. Stat. § 118.52(1) adds the following subsection to the statute’s “definitions” section:

“Educational institution” includes a public school in a nonresident school district, the University of Wisconsin System, a technical college, a nonprofit institution of higher education, a tribal college, a charter school, and any nonprofit organization that has been approved by the department.

Wis. Stat. § 118.52(1)(am). Thus, under the revised statute, “[a] pupil enrolled in a public school may attend *an educational institution* under this section for the purpose of taking a course offered by *the educational institution*.” *Id.* at § 118.52(2).

¶5. Prior to the amendment of Wis. Stat. § 118.52(12), a concurrent enrollment student paid tuition to the UWS institution. The new law addresses the issue of payment for courses taken at an “educational institution” in two important respects. First, it deletes the provision allowing a pupil’s resident school district to reject his application to attend a course in a nonresident school district “if the cost of the course would impose upon the resident school district an undue financial burden in light of the resident school district’s total economic circumstances.” Wis. Stat. § 118.52(6)(b) (2011-12). Second, it revises the tuition provision as follows:

The resident school board shall pay to *the educational institution*, for each resident pupil attending a course *at the educational institution* under this section, an amount equal to the cost of providing the course to the pupil, calculated in a manner determined by the department. *The educational institution may not charge*

¹Because the answer to this question is clear, I find it unnecessary to answer a second question posed by Mr. Stafford. He asks whether requiring tuition payment from a high school student enrolled in a concurrent enrollment course violates the constitutional guarantee of free education “for all children between the ages of 4 and 20 years.” Wis. Const. art. 10, § 3. As I interpret revised Wis. Stat. § 118.52, students taking concurrent enrollment courses are not required to pay tuition for those classes. Therefore, there is no danger that they might be unconstitutionally deprived of their right to a free education.

to or receive from the pupil or the pupil's resident school board any additional payment for a pupil attending a course at the educational institution under this section.

Wis. Stat. § 118.52(12) (new language emphasized).

¶6. You ask whether concurrent enrollment classes come within the ambit of revised Wis. Stat. § 118.52. UWS concludes that they do not; DPI concludes that they do. A concurrent enrollment class is unquestionably a hybrid between a public high school class and a UWS class. The very term used to describe it—*concurrent*—makes that clear. As I will discuss below, such a class has features that closely resemble a high school class (most notably, it is taught by a high school teacher in a high school classroom), as well as features that indicate a high degree of UWS control (for example, acceptance of the student as a UWS “special student,” and issuance of an official UWS transcript). On balance, I find that the greater weight of the salient characteristics of concurrent enrollment supports DPI’s position. Thus, I conclude that a student taking a concurrent enrollment class at her high school attends an educational institution under Wis. Stat. § 118.52.

¶7. The factual basis for my conclusion is taken from the letters and attachments from UWS and DPI, concurrent enrollment brochures published by the UWS campuses at Whitewater, Oshkosh, Green Bay, and Marinette, and a policy paper published by the UWS Financial Administration, *College Credit in High Schools (G36)* (Revised 1998), to which these materials refer. I also reviewed the “Memorandum of Understanding between the Department of Public Instruction and the University of Wisconsin Colleges regarding the Establishment of a Dual Enrollment Partnership,” signed on July 12, 2012, by Tony Evers, State Superintendent of DPI, and Ray Cross, then-Chancellor of UW Colleges and UW-Extension (now President of UWS).

¶8. According to the information you have provided, although a student will typically receive her concurrent enrollment instruction in a high school classroom, she is a student of UWS in many respects. Before she can take a concurrent enrollment course for college credit, she must apply to and be accepted by the UWS institution offering the course. The academic eligibility criteria for admission are set by UWS. If accepted, a student will be enrolled in the UWS institution as a special student. She will receive a UWS grade from the institution, which will be memorialized on a UWS transcript. The student will receive college credit that is no different from college credit earned by attending a conventional UWS course in a conventional manner. While enrolled in the course, the student will have access to a variety of UWS resources, including the library, computer labs, on-campus musical, theatrical, and sporting events, and campus community events.

¶9. While a concurrent enrollment class may be taught by a high school teacher, the teacher’s instruction is circumscribed by UWS in most respects. First, the teacher must be certified and approved by UWS. UWS requires the teacher to have a master’s degree in his field. He is an adjunct professor of the relevant UWS institution for the duration of the concurrent enrollment class. The curriculum and syllabus the teacher uses are developed and implemented in consultation with UWS faculty and subject to UWS approval. The teacher works with a

specifically assigned faculty liaison to accomplish these tasks. The faculty liaison may attend the high school class during the semester to give a guest lecture and to evaluate the high school teacher. According to the UW-Oshkosh brochure, on-campus resources are available to such teachers, including materials from Polk Library and 47 on-campus computer labs. They also receive a TitanCard, the official identification card at UW-Oshkosh. The card provides teachers access to music and theatre productions, athletic games and campus community events.

¶10. Based on the summary of factors in the preceding two paragraphs, I conclude that a student taking a concurrent enrollment class at her high school is attending an educational institution, *i.e.*, a college in the University of Wisconsin System, within the meaning of Wis. Stat. § 118.52. The requirements imposed and benefits granted to the student compel this conclusion, as does the control UWS asserts over the teacher's conduct of the course. UWS offers several arguments in support of its position that concurrent enrollment falls outside Wis. Stat. § 118.52, but none is persuasive.

¶11. First, UWS suggests that the student's high school, not UWS, is "offering" the concurrent enrollment course, so that the course options statute does not apply. *See* Wis. Stat. § 118.52(2) (statute applies to a course "offered by" an "educational institution"). Given the hybrid nature of a concurrent enrollment course, I conclude that it is more accurate to say that the course is "offered" by *both* the student's own high school *and* the UWS institution that approves the teacher (and treats him as an adjunct professor), approves the curriculum and syllabus, accepts the student, and gives the student college credit. This interpretation is consistent with the common understanding of how and by whom an academic course is "offered." *See* Webster's Third New Int'l Dictionary 1566 (Unabridged) (1986) ("offer": "to make available or accessible: SUPPLY, AFFORD . . . <the college [offers] courses in Russian>").

¶12. In each of the rest of its arguments, UWS highlights a specific subsection of Wis. Stat. § 118.52 and explains that it does not apply to a student taking a concurrent enrollment class. These subsections include the extension of the same rights and privileges to a course options student enjoyed by conventional students; the imposition of the same rules and regulations on a course options student applicable to conventional students; and the responsibility of all course options students to provide and pay for their own transportation to a class outside of their resident school district. I will address each of these arguments in turn. However, in addition to their individual shortcomings, these arguments suffer from a common fundamental problem: none of the cited subsections purports to define or limit the types of classes or students that come within the course options statute. For example, a student's access to "all of the rights and privileges of other pupils attending the educational institution" does not determine whether a course he takes is subject to Wis. Stat. § 118.52. The reverse is true. If the student and the class meet the conditions of Wis. Stat. § 118.52(1) and (2), the course options statute applies and the student is thus entitled to the same "rights and privileges" as other students.

¶13. UWS asserts first that Wis. Stat. § 118.52 applies only if the student enjoys all the rights and privileges of the institution, but that concurrent enrollment students enjoy only some UWS rights and privileges. *See* Wis. Stat. § 118.52(9). A course remains within the ambit of

Wis. Stat. § 118.52 even if the educational institution provides the student with less than the full panoply of college benefits associated with the status of a fulltime college student, such as access to student health services. A sensible reading of Wis. Stat. § 118.52(9) is that it guarantees “all of the rights and privileges of other pupils attending the educational institution” *to the extent that* a particular right or privilege might apply to a particular student under the specific circumstances.

¶14. UWS similarly argues that Wis. Stat. § 118.52 applies only if the concurrent enrollment student is subject to the entire universe of rules and regulations in force at the educational institution. It assumes that concurrent enrollment students, physically located in their high schools, will be disciplined exclusively by and according to the rules of their high schools. In UWS’s view, this situation is inconsistent with Wis. Stat. § 118.52(9), which provides that “[a] pupil attending a course at an educational institution under this section . . . is subject to the same rules and regulations as” other pupils attending the educational institution. I conclude that, like the “right or privilege” language in Wis. Stat. § 118.52(8), this provision should be applied reasonably to impose the educational institution’s rules and regulations on the concurrent enrollment student to the extent they relate to the student’s coursework within that institution.

¶15. The hybrid nature of a concurrent enrollment course warrants a hybrid system of discipline. On the one hand, given the physical location of these classes in a public high school, it is reasonable to assume that a student’s physical misconduct (talking or disruptive behavior, for example) would be disciplined by the public school, which has physical control over the student. On the other hand, any form of academic misconduct (cheating or plagiarism, for example) would be subject to the disciplinary apparatus of the UWS institution, as it would be for any other special student. That disciplinary apparatus is described in Wis. Admin. Code § UWS ch. 14. Under the Code, a “[s]tudent” means any person who is *registered* for study in an institution for the academic period in which the misconduct occurred.” *Id.* at § UWS 14.02(13). Because a concurrent enrollment student is enrolled as a special student of UWS and receives a grade from UWS recorded on a UWS transcript, the student is “registered for study in [a UWS] institution.” Thus, she is subject to the UWS sanctions for academic misconduct to the extent they relate to her participation in the concurrent enrollment course.

¶16. On a related note, Wis. Stat. § 118.52(10) provides that the “resident school board shall provide to the educational institution . . . upon request . . . a copy of any expulsion findings” or “disciplinary proceedings.” Presumably, these records would be as available to the UWS as any other “educational institution” subject to Wis. Stat. § 118.52. Significantly, DPI’s “Course Options Application Form” (revised in February 2014), includes a signature box labeled “II. PARENT SIGNATURE AND RELEASE OF RECORDS.” The parent is instructed as follows: “s. 118.52(10), Wis. Stats., authorizes the educational institution to request any student records relating to expulsion.” There is no suggestion that the parent’s release of records is applicable to all educational institutions participating in the course options program *except* UWS institutions.

¶17. Lastly, UWS asserts that the transportation provision, which gives a student’s parent the responsibility for transporting the pupil to and from a course options class, indicates

that the statute cannot possibly apply to a class that is physically located inside a student's high school building. *See* Wis. Stat. § 118.52(11)(a). This transportation rule applies to all educational institutions embraced by the statute. While the statute is clear that parents are responsible for transporting students who *do* have transportation costs, it does not require all course options students to have such costs. Obviously, a student taking a concurrent enrollment course at her own high school needs no special transportation to get there. As to that student, the provision is superfluous. However, the fact that the rule is irrelevant for concurrent enrollment courses does not mean that such courses are therefore exempt from the rest of Wis. Stat. § 118.52.

¶18. My conclusion that concurrent enrollment courses come within the ambit of Wis. Stat. § 118.52 "course options" is consistent with legislative intent. *See State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶51, 271 Wis. 2d 633, 681 N.W.2d 110 ("legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation"). Governor Walker recommended the changes to Wis. Stat. § 118.52 that were ultimately adopted. His intent was to "[e]xpand the part-time open enrollment program to create a course options program." Dep't of Admin., Div. of Exec. Budget & Fin., *State of Wisconsin Executive Budget (Scott Walker, Governor)* (February 2013) at 601 (emphasis added). The Legislative Fiscal Bureau prepared an analysis of this expansion plan that it submitted to the Joint Committee on Finance. In that analysis, the Bureau summarized the types of programs that would come under the course options umbrella. Among those programs was the concurrent enrollment program:

In addition to the statutory [part-time open enrollment] programs, the UW System and WTCS [Wisconsin Technical College System] have established by policy additional programs under which pupils can take courses at their high school for postsecondary credit. Under the UW System's College Credit in High School programs, offered by UW-Oshkosh and UW-Green Bay, students can earn high school and college credit provided they pay for the cost of the college credit, which is currently set at half the per credit tuition rate. DPI and UW Colleges have also entered in the memorandum of understanding to begin a statewide dual enrollment partnership.

Legislative Fiscal Bureau, *Report to Joint Committee on Finance: Expand Part-Time Open Enrollment Program to Course Options Program*, Paper 523 (May 29, 2013) at 3-4 [hereinafter, "LFB Report"]. Governor Walker's original proposal was enacted into law virtually unchanged.

¶19. I understand that the foregoing interpretation of the statute has a definable financial impact. Before the revision of Wis. Stat. § 118.52, a student taking a concurrent enrollment course for college credit paid tuition (at a reduced rate) to UWS, either directly or indirectly. LFB Report at 30. Under the revised statute, which (as I have concluded) embraces concurrent enrollment courses, the student will pay no tuition to UWS either directly or indirectly. Instead, "[t]he resident school board shall pay to the educational institution, for each resident pupil attending a course at the educational institution under this section, an amount equal to the cost of providing the course to the pupil, calculated in a manner determined by the department [of public instruction]." Wis. Stat. § 118.52(12). Under this language, the financial

impact on UWS (the payments it will receive) and the resident school district (the payments it will make) will be decided by DPI. Not only does the student no longer pay any tuition for a concurrent enrollment course, his application to attend a concurrent enrollment course cannot be denied on the ground that it might impose "an undue financial burden" on his resident school district. Wis. Stat. § 118.52(6)(b).

¶20. Providing concurrent enrollment courses to high school students at no cost to the students is consistent with the legislative intent in revising Wis. Stat. § 118.52. In its report to the Joint Finance Committee, the Fiscal Bureau alerted the Committee to several fiscal implications of the plan:

- The options would be provided at no cost to students, because the educational institutions would not be able to charge any additional payment beyond the DPI-determined amount to pupils participating in the program.

....

- To the extent that school districts would be paying for courses that pupils would pay for under current programs, it could be viewed as an additional mandate on districts, especially since the ability to reject an application on the basis of undue financial burden would be removed under the bill.

LFB Report at 5-6. Directly confronted with these financial questions, the legislature enacted the Governor's course options proposal without significant amendment.²

¶21. I conclude that the new course options provision of Wis. Stat. § 118.52 applies to concurrent enrollment classes.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:MFW:mlk

²The LFB Report also warned that implementation of the course options program "would expand DPI's role in higher education, such as resolving appeals of rejections and determining the cost of courses at institutions of higher education. This would arguably be inconsistent with the statutory responsibilities of the UW Board of Regents and WTCS Board and the governing structures of private and tribal institutions." LFB Report at 6.



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

October 15, 2014

OAG-05-14

Mr. Kevin J. Kennedy
Director and General Counsel
Government Accountability Board
212 East Washington Avenue, Third Floor
Madison, WI 53703

Dear Mr. Kennedy:

¶ 1. In your official capacity as Director and General Counsel of the State of Wisconsin Government Accountability Board ("the GAB"), you ask several questions about the applicability of Wisconsin's open meetings law to the activities of the election canvassing boards. These boards are statutorily charged with examining election day records for completeness and accuracy and making official determinations and certifications of election results at the local, municipal, school district, county, and state levels.

¶ 2. Your primary inquiry asks, for each level of canvassing, whether the canvassing activities constitute a "meeting" of a "governmental body" subject to the open meetings law under Wis. Stat. § 19.82(1) and (2). Relatedly, you also ask whether the requirements of the open meetings law apply to the activities of permanent and temporary municipal employees who are hired by some larger municipalities for the purpose of conducting post-election administrative activities in preparation for the meetings of the municipal, school district, and county canvassing boards. Finally, for those canvassing activities that are a meeting of a governmental body, you ask to what extent such meetings are subject to a variety of specific open meetings requirements.

¶ 3. I conclude that canvassing boards are governmental bodies subject to the open meetings law—including the public notice, open session, and reasonable public access requirements—when they convene for the purpose of carrying out their statutory canvassing activities, but not when they are gathered only as individual inspectors fulfilling administrative duties. The state-level canvass conducted by the chairperson of GAB or the chairperson's designee is not a meeting of a governmental body subject to the open meetings law. The open meetings law also does not apply to the activities of municipal staff employees, whether

permanent or temporary, who are conducting administrative activities. I further conclude that overlapping violations of the open meetings law and of election laws may be prosecuted under either or both bodies of law, with any possible conflicts between statutes being resolved in favor of the more specific provisions.

General Principles Governing the Applicability of the Open Meetings Law

¶ 4. The requirements of the open meetings law generally apply to “[e]very meeting of a governmental body.” Wis. Stat. § 19.83(1). In order to determine whether the activities of the canvassing boards at each level are subject to the open meetings law, it is necessary to examine whether each level of canvassing board is a “governmental body” and, if so, whether its canvassing activities constitute a “meeting.”

¶ 5. The open meetings statutes define a “governmental body” as “a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order.” Wis. Stat. § 19.82(1). This definition contains two elements: (1) the body’s creation by constitution, statute, ordinance, rule or order; and (2) the form of “a state or local agency, board, commission, committee, council, department or public body corporate and politic.” *Id.* The use of the terms “agency,” “board,” “commission,” “committee,” “council,” “department,” and “body corporate and politic” all suggest that a governmental body must be a multi-member group that acts together as a collective unit to perform some common governmental purpose. *Id.*

¶ 6. If a canvassing board is determined to be a “governmental body,” it conducts a “meeting” subject to the open meetings law when its members convene “for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.” Wis. Stat. § 19.82(2). The use of the phrase “in the body” in that definition suggests that a meeting subject to the open meetings law must involve powers and duties that are vested in the body as a collective unit, rather than in the members of the body separately considered as individual government officials. See 57 Op. Att’y Gen. 213, 217-18 (1968) (concluding that earlier version of open meetings law applied to a group that has powers or duties vested in it by law, or delegated to it by law, when it acts formally as a body).

1. Local Canvassing Boards

¶ 7. Canvassing at the local or polling place level is governed by Wis. Stat. § 7.51, which charges the election inspectors at each polling place with conducting a canvass of that polling place immediately after the polls close on election day.

¶ 8. The election inspectors for each polling place are appointed by the governing body of the municipality where the polling place is located. Wis. Stat. § 7.30. Each polling place is required to have seven inspectors or, in specified circumstances, a greater or lesser number (but never fewer than three) determined by the governing body of the municipality. *Id.* The governing body of the municipality also may provide for different sets of inspectors to work at different times on election day and may appoint alternates to maintain adequate staffing at polling places. *Id.*

¶ 9. Election inspectors are appointed under a dominant political party system. The two political parties whose candidates for governor or president received the largest number of votes at the polling place in the previous general election may submit lists of nominees from which election inspectors are appointed, with the first-place party receiving one more inspector at that polling place than is received by the second-place party. Wis. Stat. § 7.30(2) and (4)(c). Election inspectors serve for two-year terms. Wis. Stat. § 7.30(6).

¶ 10. Election inspectors have numerous administrative duties staffing the polling place on election day, including setting up the polling place, preserving order, registering electors, recording electors, resolving challenges to electors, issuing ballots, monitoring voting equipment, and properly completing required forms. See Wis. Stat. § 7.37. Immediately after the close of voting on election day, the polling place remains open to the public and the election inspectors are then charged with performing the specific post-election canvassing duties set forth in Wis. Stat. § 7.51, which include reconciling voter lists, counting votes, preparing election returns, certifying certain election results, securing election materials, and delivering election materials to the municipal clerk. These canvassing activities must be conducted publicly and, with certain exceptions for absentee ballots, are to continue without adjournment until the canvass is completed and the return statement has been made. Wis. Stat. § 7.51(1).

¶ 11. Under the above facts, does a local canvassing board constitute a “governmental body” within the meaning of Wis. Stat. § 19.82(1)? In your letter of inquiry, you express the view that the term “Local Board of Canvassers” is only a

label appended to the election inspectors at each polling place who, in your view, act not as a collective body, but rather as an aggregate of individual election officials. In support of this view, you note that the term "Local Board of Canvassers" is set out only in the title of Wis. Stat. § 7.51 and is not defined or referenced elsewhere in the statutes. You also suggest that the canvassing duties under Wis. Stat. § 7.51 are not assigned to the election inspectors as a collective body, but rather are administrative duties assigned to them as a group of individual election officials. This conclusion, you suggest, is supported by the facts that different municipalities have different numbers of election inspectors serving a disparate number of polling places, that some individual polling places serve more than one ward and are staffed by more than one set of election inspectors, and that, in many municipalities, different election inspectors serve at different elections and the number of election inspectors may vary from one election to another.

¶ 12. I respectfully disagree with that view.

¶ 13. First, while it is true that the precise term "Local Board of Canvassers" is not used outside the title of Wis. Stat. § 7.51, Wis. Stat. § 7.37(12) provides that the election inspectors for each polling place "shall constitute the board of canvassers of their polling place and in that capacity shall perform the duties under s. 7.51." Titling section Wis. Stat. § 7.51 "Local Board of Canvassers" instead of "Board of Canvassers of the Polling Place" does not change the fact that the statutes substantively create a board at each polling place that is composed of specific officials and charged with performing the canvassing duties under Wis. Stat. § 7.51. These local canvassing boards thus are "created by . . . statute" within the meaning of Wis. Stat. § 19.82(1).

¶ 14. Second, the canvassing duties under Wis. Stat. § 7.51 are assigned to each local canvassing board as a collective body, not as a group of individual officials. While it is true that the composition of the local canvassing boards varies from one polling place to another, it is also true that each individual local canvassing board has a determinate size fixed by the municipal governing body and is composed of members serving definite terms of office. In addition, while it is true that some of the canvassing activities under Wis. Stat. § 7.51 are essentially ministerial in nature and have no necessary collective dimension, it is also true that Wis. Stat. § 7.51 assigns some of the most central and important canvassing functions to each local canvassing board as a collective body, rather than as a group of individual officials. Significant questions about how to treat two or more ballots that are folded together and about how to count a ballot that has not been properly

or clearly completed are decided by a majority vote of the election inspectors. Wis. Stat. § 7.51(2)(a) and (b).

¶ 15. These provisions for actions by majority vote of the election inspectors make it clear that central and important features of the canvassing functions under Wis. Stat. § 7.51 are assigned to the election inspectors not as individual officials, but as a collective body at each polling place. Each local canvassing board thus has the corporate character necessary for a “governmental body.”

¶ 16. Because the local canvassing boards are “created by . . . statute” and because their members act together as a collective unit to perform some common governmental purpose, I conclude that each such board is a “governmental body” within the meaning of Wis. Stat. § 19.82(1).

¶ 17. The next question is whether the post-election canvassing activities by the members of the local canvassing board—i.e., the election inspectors—constitute a “meeting” within the meaning of Wis. Stat. § 19.82(2).

¶ 18. The key consideration here is whether the inspectors, when acting under Wis. Stat. § 7.51, are exercising powers and duties that are vested in the local canvassing board as a body, rather than in the individual members. For the reasons already discussed, it is my conclusion that the conduct of local canvassing activities under Wis. Stat. § 7.51—in particular, the making of majority decisions regarding the handling of questionable ballots—constitutes the exercise of powers and duties that are assigned to each local canvassing board as a collective body, rather than as a group of individual officials. The post-election convening of election inspectors for the purpose of conducting the local canvass thus is a “meeting” within the meaning of Wis. Stat. § 19.82(2).

¶ 19. It does not follow, however, that *every* gathering of the election inspectors of a particular polling place constitutes a meeting of the local canvassing board. Election inspectors perform many administrative functions at the polling place throughout election day. Accordingly, there are likely to be frequent occasions when a sufficient number of inspectors will be gathered together in the polling place to constitute a quorum of the local canvassing board. Before the polls close, however, the inspectors are not exercising any powers vested in them as a body. Rather inspectors are performing administrative duties that are assigned to them as individual officials. *See* Wis. Stat. § 7.37.

¶ 20. This is equally true of activities performed under Wis. Stat. § 6.88(3), which authorizes election inspectors, during voting hours, to open absentee ballot envelopes and to verify compliance with certain procedural requirements for absentee voting. Absentee ballots opened pursuant to that provision are not counted or examined for voter intent during voting hours, but rather are placed in the appropriate ballot box without being examined by the inspectors. Wis. Stat. § 6.88(3)(b). After the polls close, the canvassing of those absentee ballots is completed along with all other ballots pursuant to Wis. Stat. § 7.51. Only then are the inspectors convened for the purpose of exercising the powers and duties vested in the local canvassing board as a body.¹ I conclude, therefore, that the gathering of election inspectors in a polling place constitutes a “meeting” of the local canvassing board only after the polls close and the canvassing under Wis. Stat. § 7.51 begins.

¶ 21. Based on all of the above considerations, I conclude that the canvassing activities conducted at the local polling place level pursuant to Wis. Stat. § 7.51 constitute a “meeting” of a “governmental body” and thus are subject to the requirements of the open meetings law.

2. Municipal Canvassing Boards

¶ 22. The duties of the municipal board of canvassers are to declare election results for municipal offices, to prepare statements showing the results of municipal elections and referenda, and to prepare statements after a primary certifying candidates who have been nominated for municipal office. Wis. Stat. § 7.53(2)(d).

¶ 23. The statutes create two different categories of municipal canvassing boards, depending on whether all wards in the municipality vote at a single polling place. Each has its own composition, rules, and procedures.

¶ 24. In municipalities with two or more wards that are not combined, the municipal board of canvassers is composed of the municipal clerk and two qualified electors of the municipality chosen by the clerk. Wis. Stat. § 7.53(2)(a). The municipal canvass may begin as soon as the board has received the returns from all polling places on election night and must begin no later than 9:00 a.m. on the

¹ A municipality also may elect to count absentee ballots in the manner provided for in Wis. Stat. § 7.52, in which case the municipality must establish a separate board of absentee ballot canvassers, pursuant to Wis. Stat. § 7.53(2m). Under the reasoning of this opinion, such boards of absentee ballot canvassers, where they exist, are governmental bodies subject to the open meetings law.

Monday after the election. Wis. Stat. §§ 7.515(6)(b) and 6.97(4). The board must also reconvene if necessary for the purpose of processing any outstanding absentee or provisional ballots or amending election returns. *Id.*

¶ 25. In a municipality with only a single polling place—i.e., a municipality with only a single ward or one in which all of the wards vote at a single polling place and results are combined—the election inspectors who conduct the post-election polling place canvass under Wis. Stat. § 7.51 also constitute the municipal board of canvassers. Wis. Stat. § 7.53(1)(a). When municipal offices or municipal referenda are on the ballot, the inspectors must conduct both the polling place canvass and the municipal canvass on election night. Wis. Stat. § 7.53(1)(a). They complete the canvass statement, certify the municipal election results, and officially determine the winners. *Id.* The municipal board must also subsequently reconvene if necessary for the purpose of processing absentee or provisional ballots or amending election returns. *Id.* If the election inspectors acting as the municipal board of canvassers are unavailable for any such subsequent meeting, then the municipal clerk may replace the inspectors with a three-member municipal canvassing board consisting of the clerk, the chief election inspector of the municipality's one polling place, and one other election inspector. Wis. Stat. § 7.53(1).

¶ 26. In my opinion, for both categories of municipality, the municipal board of canvassers is a “governmental body” within the meaning of Wis. Stat. § 19.82(1) and the convening of its members for the purpose of carrying out canvassing duties under Wis. Stat. § 7.53 is a “meeting” within the meaning of Wis. Stat. § 19.82(2). The reasons supporting this opinion are similar to those already discussed in connection with local canvassing boards.

¶ 27. First, the municipal board of canvassers in both categories of municipality is “created by . . . statute.” See Wis. Stat. § 7.53(1) (creating the board for municipalities with only one polling place) and (2) (creating the board for municipalities with two or more wards).

¶ 28. Second, the canvassing duties under Wis. Stat. § 7.53 are assigned to each municipal canvassing board as a collective body. This is readily apparent for boards in municipalities with two or more wards because, in those municipalities, the municipal canvassing board is a discrete body with its own statutory responsibilities under Wis. Stat. § 7.53(2). In municipalities with only a single polling place, the municipal canvassing board is not a discrete entity because it is composed of the same election inspectors who form the local canvassing board and

who also have various administrative duties at the polling place. Nonetheless, for the reasons already discussed with regard to local canvassing boards, I conclude that the canvassing activities assigned to those inspectors under Wis. Stat. § 7.53(1) are assigned to them in their collective capacity as the municipal canvassing board.

¶ 29. Because the municipal canvassing boards are “created by . . . statute” and because their members act together as a collective unit to perform a common governmental purpose, I conclude that each such board is a “governmental body” within the meaning of Wis. Stat. § 19.82(1).

¶ 30. Since a municipal canvassing board is a “governmental body,” I next consider whether the canvassing activities by the members of such a body constitute a “meeting” within the meaning of Wis. Stat. § 19.82(2).

¶ 31. For the discrete municipal canvassing boards in municipalities with two or more wards, it is readily apparent that any time such a discrete, statutorily created body convenes for the purpose of exercising the powers and duties vested in the body under Wis. Stat. § 7.53(2), that gathering will constitute a “meeting,” as defined in Wis. Stat. § 19.82(2).

¶ 32. For municipal canvassing boards in municipalities with a single polling place, the same election inspectors who compose the municipal canvassing board have additional duties: they compose the local canvassing board and they have various administrative duties in the polling place on election day. When the election inspectors in such a municipality convene for the purpose of exercising the specific powers and duties vested in the municipal canvassing board under Wis. Stat. § 7.53(1), that gathering is a “meeting” as defined in Wis. Stat. § 19.82(1). If they convene solely to exercise the powers and duties of the local canvassing board, that is a meeting of the local board, but not of the municipal board. If they gather to exercise the powers and duties of both the local and municipal boards, the gathering may be treated, for open meetings law purposes, as a joint meeting. But when the inspectors are gathered in the polling place solely to perform administrative duties that are assigned to them as individual officials under Wis. Stat. § 7.37, that gathering is not a “meeting” of a governmental body at all.

¶ 33. For all of these reasons, I conclude that the canvassing activities conducted at the municipal level pursuant to Wis. Stat. § 7.53 constitute a “meeting” of a “governmental body” and thus are subject to the requirements of the open meetings law.

3. School District and County Canvassing Boards

¶ 34. The analysis for school district and county canvassing boards is straightforward. School district canvassing boards are created and assigned their duties by Wis. Stat. § 7.53(3). County canvassing boards are created and assigned their duties by Wis. Stat. § 7.60. Both types of board are created by statute and their duties are assigned to them as boards, rather than as groups of individuals. Both, therefore, are “governmental bodies” as defined in Wis. Stat. § 19.82(1). When those bodies convene for the purpose of exercising the powers and duties vested in them by Wis. Stat. §§ 7.53(3) and 7.60, respectively, the gathering is a “meeting,” as defined in Wis. Stat. § 19.82(2). The canvassing activities conducted by school district and county canvassing boards, therefore, are meetings of governmental bodies subject to the requirements of the open meetings law.

4. State Canvass

¶ 35. Under Wis. Stat. § 7.70(3)(a), state-level canvassing activities are conducted by the chairperson of the GAB or by a designee of the chairperson. State-level canvassing duties are thus vested in a single election official, rather than in a collective body. The open meetings law defines “governmental body” using the terms “agency,” “board,” “commission,” “committee,” “council,” “department,” and “body corporate and politic,” suggesting that such a body must be a multi-member group. See Wis. Stat. § 19.82(1). A public office occupied by a single person, therefore, is not a governmental body subject to the open meetings law. See *Plourde v. Habegger*, 2006 WI App 147, 294 Wis. 2d 746, ¶¶ 12-14, 720 N.W.2d 130 (open meetings law does not apply to a governmental department with only a single member); 67 Op. Att’y Gen. 250 (1978) (open meetings law does not apply to the office of county coroner). Therefore, although the GAB chairperson or his or her designee is expressly required to “publicly canvass the returns,” Wis. Stat. § 7.70(3)(a), those canvassing activities are not subject to the separate requirements of the open meetings law.

¶ 36. As a matter of agency practice, public notice of the state-level canvass that conforms to the notice of requirements of Wis. Stat. § 19.84 is routinely given. Although that practice is not required by the open meetings law, it is a reasonable method of ensuring that the public is notified of the precise time and location of the state canvass and serves the important public interest in transparency and accessibility in elections.

5. Activities of Municipal Employees Organizing Election Materials

¶ 37. Finally, you ask whether the open meetings law applies to the activities of permanent and temporary municipal employees who are assigned by some large municipalities to organize election materials that have been delivered to the municipal clerk or to the municipal election commission, and to prepare those materials for the municipal canvass and for delivery to the county clerk or the county board of election commissioners pursuant to Wis. Stat. § 7.51(5)(b). Such municipal employees are administrative staff personnel and do not constitute a governmental body. Moreover, the purely administrative organizational duties they are performing are not statutorily vested in any collective body. For these reasons, it is my opinion that the activities of such municipal employees are not subject to the requirements of the open meetings law.

Applicability of Specific Open Meetings Requirements to Canvassing Boards

¶ 38. Because canvassing activities at the local, municipal, school district, and county levels are subject to the open meetings law, they are also subject to the specific statutory open meetings requirements.

1. Public Notice Requirements

¶ 39. First, for each level of canvassing board, you ask whether the board's meetings are subject to the specific public notice requirements of Wis. Stat. § 19.84 and, if so, who is responsible for ensuring compliance with those requirements.

¶ 40. Because meetings of local, municipal, school district, and county canvassing boards all are meetings of governmental bodies subject to the open meetings law, each such board must give notice to the public of each of its meetings. Wis. Stat. § 19.84(1)(b). This notice must be given at least 24 hours before the meeting begins unless, for good cause, it is impossible or impractical to give that much notice, in which case as little as two hours notice may be given. Wis. Stat. § 19.84(3). The notice must set forth the time, date, place, and subject matter of the meeting "in such form as is reasonably likely to apprise members of the public and the news media thereof." Wis. Stat. § 19.84(2).

¶ 41. The public notice must be given through the board's presiding officer or the officer's designee. For local canvassing boards and for municipal canvassing

boards in municipalities with only one polling place, the presiding officer is the chief election inspector of the polling place in question. *See* Wis. Stat. §§ 7.30(6)(b), 7.37(12), 7.51, and 7.53(1). For all other municipal canvassing boards, the presiding officer is the municipal clerk. *See* Wis. Stat. § 7.53(2). For school district canvassing boards, the presiding officer is the school district clerk. *See* Wis. Stat. § 7.53(3)(a). For county canvassing boards, the presiding officer is the county clerk. *See* Wis. Stat. § 7.60(2).

¶ 42. The open meetings law does not require a governmental body to provide public notice by any particular method, but rather permits the body to use any method of giving notice that is “reasonably likely to apprise members of the public” of the requisite information. Wis. Stat. § 19.84(2). The election notice that every municipality or special purpose district must publish pursuant to Wis. Stat. § 10.01(2)(d), however, is insufficient to satisfy Wis. Stat. § 19.84(2). That notice, termed a “Type D” notice, gives polling place locations and hours and thus provides the locations and times at which election inspectors will be performing their duties at the polls. But it does not notify the public that a post-election meeting of the local canvassing board will take place after the close of the polls or describe the subject matter of that meeting.

¶ 43. The notice requirements of Wis. Stat. § 19.84 can be easily met for local canvassing boards, however, by simply adding a sentence to each Type D notice indicating that, immediately after the polls close, the election inspectors at each polling place will convene as the local canvassing board for the purpose of conducting the local canvass pursuant to Wis. Stat. § 7.51. Similarly, for municipalities with only one polling place, the Type D notice could also indicate that, after or jointly with the meeting of the local canvassing board, the election inspectors will convene as the municipal canvassing board for the purpose of conducting the municipal canvass pursuant to Wis. Stat. § 7.53(1). In order to ensure compliance with the notice requirements of the open meetings law, I recommend that the GAB advise all pertinent election officials that such information should be included in future Type D notices.

¶ 44. According to your letter of inquiry, the GAB already advises that all other meetings of canvassing boards at the various levels should be noticed pursuant to Wis. Stat. § 19.84. That practice should continue in accordance with this opinion.

2. Open Session Requirements

¶ 45. Second, for each level of canvassing board, you ask whether meetings must be held in “open session,” as defined in Wis. Stat. § 19.82(3) and whether it is ever permissible for such a meeting to go into closed session, pursuant to Wis. Stat. § 19.85.

¶ 46. The open meetings law generally requires that every meeting of a governmental body must be “reasonably accessible to members of the public” and “open to all citizens at all times.” Similarly, an “open session” is defined in Wis. Stat. § 19.82(3) as “a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times.” Every meeting of a governmental body must initially be convened in “open session.” See Wis. Stat. §§ 19.83 and 19.85(1). All business of any kind, formal or informal, must be initiated, discussed, and acted upon in “open session,” unless a closed session is authorized by one of the exemptions set forth in Wis. Stat. § 19.85(1). See Wis. Stat. § 19.83. Accordingly, every meeting of a local, municipal, school district, or county canvassing board must begin in open session and must conduct all meeting business in open session unless a closed session is specifically authorized.

¶ 47. In light of the very limited and specialized powers and duties that are statutorily vested in canvassing boards, with one exception, none of the collective activities of such a board fall within any of the authorized purposes of a closed session under Wis. Stat. § 19.85(1)(a) through (i). Nothing in the Election Code² suggests that any portion of the canvassing process can be conducted behind closed doors. To the contrary, various Election Code provisions require election canvasses to be conducted publicly. See, e.g., Wis. Stat. §§ 7.51(1), 7.53(1)(a) and (2)(d), and 7.60(3).

¶ 48. The one exception relates to Wis. Stat. § 19.85(1)(g), which allows a governmental body to go into closed session for the purpose of “[c]onfer[ring] with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.” As noted in your letter of inquiry, there can be some circumstances in which the actions of a board of canvassers will be challenged in litigation and, in such circumstances, it may be necessary and appropriate for a canvassing board to consult in closed session with its legal counsel. In that type of situation, a closed session of the canvassing board under Wis. Stat. § 19.85(1)(g)

² Wisconsin’s Election Code is located in Wis. Stat. chs. 5 through 12.

would be permissible. A closed session for the limited purpose of consulting with legal counsel about pending or anticipated litigation would not include conducting any actual canvassing activities in closed session and thus would not violate the Election Code requirements that the canvasses be conducted publicly.

3. Access to Election Documents and Materials

¶ 49. Third, you ask to what extent any applicable openness requirements compel election officials to permit members of the public to inspect election documents or materials during a meeting of a local, municipal, school district, or county canvassing board.³ In order to respond to this question, it is necessary to consider the pertinent requirements of both the open meetings law and the Election Code, as well as general principles governing the proceedings of governmental bodies.

¶ 50. The open meetings law requires that all open session meetings of a governmental body must be “reasonably accessible to members of the public” and “open to all citizens at all times.” Wis. Stat. § 19.82(3). Absolute or total access is not required, as long as there are no systematic or arbitrary exclusions or restrictions. See *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis. 2d 553, 580, 494 N.W.2d 408 (1993). Parallel provisions of the Election Code require that the various levels of canvassing meetings must be conducted publicly. See Wis. Stat. §§ 7.51(1), 7.53(1)(a) and (2)(d), and 7.60(3). The Election Code does not further specify the meaning of “publicly.” In my opinion, courts would likely construe these open meetings and Election Code provisions together as providing that canvassing board meetings are both “reasonably accessible” and conducted “publicly” if members of the public are given a reasonable opportunity to meaningfully observe the proceedings.

¶ 51. Reasonable limits on public access to government meetings, however, are both necessary and permissible. The express legislative policy of the open meetings law is that “the public is entitled to the fullest and most complete information regarding the affairs of government *as is compatible with the conduct of governmental business*.” Wis. Stat. § 19.81(1) (emphasis added). The Election Code

³ You ask only about the effect of the open meetings law on the inspection of election documents or materials. Some requests to inspect such items may also give rise to questions under the public records law. This opinion responds only to the questions you ask and does not address any issues arising under the public records law.

provides that, at a polling place, the election inspectors have “full authority to maintain order and to enforce obedience to their lawful commands during the election and the canvass of the votes. Wis. Stat. § 7.37(2). More generally, governmental bodies are held to have the inherent power to regulate their proceedings in any way that is reasonably necessary for the proper exercise of their authorized functions, to preserve necessary order and decorum, and to restrain any individual to the extent necessary to enable them to perform their public duties. See *Mason’s Manual of Legislative Procedure* §§ 2.1, 2.6, 19.1, 37.2, 575, and 805-07 (2000); *Robert’s Rules of Order* § 61 (10th ed. 2000); Alice Sturgis, *Standard Code of Parliamentary Procedure* 222-23 (4th ed. 2001). Considering all these provisions and principles together, I conclude that, while canvassing boards must provide the public a reasonable opportunity to meaningfully observe their meetings, they may impose reasonable limits on public access to the extent necessary to protect the effective and orderly conduct of the canvass.

¶ 52. The same principles of reasonableness govern the public’s opportunity to inspect election documents and materials at canvassing board meetings. In general, members of the public should be permitted to inspect election documents or materials to the extent that such inspection is reasonably necessary to afford the public an opportunity to meaningfully observe the proceedings and does not interfere with the orderly conduct of the canvass. Thus, canvassers must exercise reasonable discretion to determine the manner of public access to election documents and materials that is consistent with the orderly conduct of the canvass. This discretion is not unlimited, however. The Election Code specifically provides that members of the public are never permitted to inspect the confidential portion of a poll list and are prohibited from touching any election materials or equipment during the counting of votes at a polling place or at any central counting location. See Wis. Stat. §§ 5.87(1), 6.47, and 7.41(4). Such provisions specifically addressing access to particular documents and objects supersede any conflicting general standard under the open meetings law. See *Jones v. State*, 226 Wis. 2d 565, 576, 594 N.W.2d 738 (1999).

¶ 53. Similar principles also govern the public’s opportunity to record, film, or photograph a canvassing board meeting. The open meetings law requires that a governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session meeting, as long as the activity does not interfere with the meeting. Wis. Stat. § 19.90. It is my understanding that the GAB similarly advises election officials that video and still photography is permitted during canvassing board meetings, as long as it does not disrupt or interfere with the official business of the meeting. I agree that members of the

public should be allowed to record, film, or photograph a canvassing meeting, as long as such activities are conducted in a reasonable fashion and do not interfere with the canvass.

4. Enforcement

¶ 54. Finally, you ask what are the permissible and appropriate enforcement procedures for a violation of any open meetings requirement that applies to a meeting of a canvassing board and that overlaps with a requirement of the Election Code.

¶ 55. With regard to the Election Code, as noted in your letter of inquiry, election officials are prohibited from intentionally violating any provision of Wis. Stat. chs. 5 to 12 or from willfully neglecting or refusing to perform any of the duties prescribed for them under those statutory chapters. Wis. Stat. § 12.13(2)(a) and (b)7. Violations of these Election Code requirements are enforced by the local district attorney. Wis. Stat. §§ 11.61(2) and 12.60(4). Penalties for violators range from civil forfeitures to felony incarceration. *See* Wis. Stat. §§ 11.61(1) and 12.60(1). In addition, under Wis. Stat. § 5.06, the GAB has the authority—upon its own motion or upon the sworn complaint of an elector—to review the actions of election officials for compliance with the law and to order an election official to conform his or her conduct to law. Finally, the Attorney General or a local district attorney may sue for injunctive relief or seek a writ of mandamus or a writ of prohibition whenever a violation of laws regulating the conduct of elections occurs or is proposed to occur. Wis. Stat. § 5.07.

¶ 56. With regard to the open meetings law, any member of a governmental body who knowingly attends a meeting of such body held in violation of that law or who otherwise violates a requirement of the law through some act or omission is subject to civil forfeitures. Wis. Stat. § 19.96. A court may also award such other legal or equitable relief as may be appropriate under the circumstances. *See* Wis. Stat. § 19.97(2). An action to enforce the open meetings law may be brought by the local district attorney upon the verified complaint of any person. Wis. Stat. § 19.97(1). If the district attorney refuses or otherwise fails to commence an enforcement action within twenty days after receiving a verified complaint, then the person making the complaint may bring an enforcement action on his or her relation in the name and on behalf of the State. Wis. Stat. § 19.97(4).

¶ 57. There may be circumstances in which particular conduct by an election official will violate requirements under both the Election Code and the open

meetings law. For example, a member of a canvassing board who knowingly attends an unauthorized closed session meeting of that board could also thereby be intentionally or willfully violating the Election Code requirement that the canvass be conducted publicly. In these kinds of circumstances, the question arises whether enforcement action is available under both the open meetings law and the Election Code, or whether one should prevail over the other.

¶ 58. "It is a cardinal rule of statutory construction that where two *conflicting* statutes apply to the same subject, the more specific controls." *Jones v. State*, 226 Wis. 2d at 576. But the above rule only applies where there is truly a conflict between the statutes. *Pritchard v. Madison Metro. Sch. Dist.*, 2001 WI App. 62, ¶ 15, 242 Wis. 2d 301, 625 N.W.2d 613. Conflicts between statutes are not favored and courts are required to harmonize statutes to avoid conflict when a reasonable interpretation permits. *Id.* That two statutes regulate the same event does not create a conflict. *Id.* Instead, a conflict occurs when there is no reasonable interpretation making it possible to comply with both statutes. *See id.*

¶ 59. It is not possible to predict all potential factual circumstances where the open meetings law and the Election Code could be violated. Suffice it to say, there are circumstances where the enforcement of the requirements of the open meetings law and of the Election Code would likely overlap without actually being in conflict. In such situations, it would be proper for enforcement action to proceed under either body of law or even under both. Whether to proceed and under what statutes is a matter left to the discretion of the official seeking to enforce the law.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:TCB:jrs



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

October 15, 2014

OAG-06-14

Mr. Bernard Vash
Corporation Counsel
Kenosha County
912 - 56th Street, Room LL13
Kenosha, WI 53140-3747

Dear Mr. Vash:

¶ 1. Your predecessor asked two questions relating to a county executive's veto authority to amend a line item budget appropriation. He asked whether a county executive may cross out a specific line item and replace it with a lesser figure. He also asked whether constitutional amendments limiting the Wisconsin Governor's veto power have similarly affected a county executive's power. Finally, your predecessor asked whether a particular action taken by the Kenosha County Board was legally effective.

¶ 2. I conclude that a county executive has the authority to reduce a line item from one specific dollar figure to another through the use of his partial veto. Further, recent constitutional amendments limiting the Governor's veto authority in Wis. Const. art. V, § 10(1)(c) impose no corresponding limit upon the veto authority of the county executive. I decline to answer the question about the efficacy of a particular action of the Kenosha County Board because it would turn on the resolution of facts, a task inappropriate for an attorney general opinion.

¶ 3. Your predecessor indicated that, in a past year's budget recommendation, the Kenosha County executive inserted a line item for county supervisors' health insurance assuming a premium contribution of 15 percent. When the budget was considered by the county board, the board voted to set the supervisors' insurance contribution at zero. No motion was made to add the necessary monies to the county executive's proposed budget to fund that result, but, prior to forwarding the passed budget to the county executive, the county finance department added that amount to the budget line item. This had the effect of reducing a line item in the budget.

¶ 4. The county executive exercised his veto authority by crossing out the budget line item amount and writing in a lesser amount: the original monetary

figure from his budget proposal, reflecting the 15 percent contribution. The county board failed to override the veto.

¶ 5. Your predecessor asked whether the county executive could reduce the line item in this way through the use of his partial veto. The county executive's veto power over appropriations is both constitutional and statutory. Wisconsin Const. art. IV, § 23a provides in part: "Appropriations may be approved in whole or in part by the chief executive officer [of the county] and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for in other resolutions or ordinances." The county executive's statutory veto authority under Wis. Stat. § 59.17(6) contains virtually identical language.

¶ 6. Statutory language is construed according to its plain meaning. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Both Wis. Const. art. IV, § 23a and Wis. Stat. § 59.17(6) unambiguously state that an appropriation "may be approved in whole or in part." Here, the appropriation is the amount contained in the line item. The county executive possessed the statutory authority to reduce the line item to any lesser amount.

¶ 7. Your predecessor asked that I address the applicability of 80 Op. Att'y Gen. 214 (1992), which concludes that the county board's failure to override the county executive's veto of an *entire* line item fails to restore that line item to the amount originally contained in the county executive's budget request. Those facts are not presented here. That opinion would be applicable only if the county executive had vetoed the entire line item in the budget.

¶ 8. Here, the county executive exercised his partial veto authority to disapprove an appropriation in part. If a line-item appropriation in the county board's budget is greater than the amount included in the county executive's budget request, the county executive may veto all or any part of the enacted appropriation amount, even if the resulting reduction happens to equal the amount contained in his budget request. In doing so, he acts within his constitutional and statutory authority by approving the budgeted amount "in part" within the meaning of Wis. Const. art. IV, § 23a and Wis. Stat. § 59.17(6).

¶ 9. Your predecessor next asked whether recent constitutional amendments limiting the Governor's veto authority, generally set forth in Wis. Const. art. V, § 10, impose corresponding limits upon the veto authority of the county executive.

In 1990, a constitutional amendment eliminated the Governor's ability to exercise his partial veto authority in such a way as to "create a new word by rejecting individual letters in the words of the enrolled bill." See Wis. Const. art. V, § 10(1)(c). This procedure had previously been upheld in *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988), as long as the veto resulted in a complete and workable law. See Benjamin W. Proctor, *Wisconsin's Chief Legislator: The Governor's Partial Veto Authority And The New Tipping Point*, 90 Marq. L. Rev. 739, 745 n.48 (2007). In 2008, a second constitutional amendment eliminated the Governor's ability to exercise his partial veto authority in such a way as to "create a new sentence by combining parts of 2 or more sentences of the enrolled bill." See Wis. Const. art. V, § 10(1)(c). That procedure had also previously been upheld by the courts. See Proctor, *supra*, at 745 & n.50.

¶ 10. Prior to those amendments, a previous attorney general opinion had concluded that a county executive's power to approve any part of a resolution or ordinance containing an appropriation is similar to the Governor's constitutional power. 73 Op. Att'y Gen. 92, 93-94 (1984). The opinion considered and rejected the premise that "the wording of the veto power with respect to the Governor is broader" because the Legislature approves bills, even though the first sentence of the county executive veto provisions in Wis. Const. art. IV, § 23a refers only to "appropriations." See 73 Op. Att'y Gen. at 95. The opinion reasoned that other language in Wis. Const. art. IV, § 23a, referring to "the part of the resolution or ordinance objected to," operated "to extend to [the] power of partial approval to every part of a resolution or ordinance containing an appropriation." 73 Op. Att'y Gen. at 95. Subsequent attorney general opinions agreed with 73 Op. Att'y Gen. 92. See 77 Op. Att'y Gen. 113, 118 (1988) ("In fact, the county executive's partial approval/partial veto authority with respect to appropriations carries with it a power, legislative in nature, similar to that exercised by the Governor in reference to acts of the Legislature, to change the policy of the law as originally envisaged by the county board."); 74 Op. Att'y Gen. 73, 74 (1985) (county executive veto statute "contains language substantially identical to the [Governor's] constitutional provision").

¶ 11. The amendments to Wis. Const. art. V, § 10 were not made to Wis. Const. art. IV, § 23a. The limiting language added in Wis. Const. art. V, § 10(1)(c) applies only to the Governor. Although there has been at least one legislative proposal to amend Wis. Const. art. IV, § 23a to similarly limit the county executive's veto authority, see 2009 Senate Joint Resolution 11, no such amendment has been enacted. As a result, the veto power accorded to the county executive with respect to appropriations is unaffected by those constitutional amendments.

Mr. Bernard Vash

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¶12. Your predecessor also asked whether the action taken by the Kenosha County Board in setting the contribution limit at zero was legally effective. I decline to answer that question. What the board intended by passing the motion is primarily a question of fact. "[T]he attorney general does not have the authority to determine questions of fact. 77 Op. Att'y Gen. Preface (1988)." 80 Op. Att'y Gen. 341, 344 (1992).

¶13. I conclude that a county executive may partially veto a line-item appropriation in a budget passed by the county board by inserting a lesser monetary amount, even if the resulting amount coincides with the amount in the executive's budget request. I further conclude that recent constitutional amendments limiting the Governor's veto authority under Wis. Const. art. V, § 10(1)(c) impose no corresponding limits upon the veto authority of the county executive under Wis. Const. art. IV, § 23a.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:CG:FTC:ajw



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

October 15, 2014

OAG-07-14

Mr. Bill Lueders
Wisconsin Center for Investigative Journalism
5006 Vilas Communication Hall
821 University Avenue
Madison, WI 53706

Dear Mr. Lueders:

¶ 1. You have requested guidance on the application of Wis. Stat. § 19.356(9),¹ which requires notice to public officials before an authority permits access to certain records. I am providing this opinion pursuant to Wis. Stat. § 19.39, which permits the Attorney General to give advice as to the applicability of the Wisconsin public records law to “[a]ny person.” I interpret your request as encompassing two questions: (1) whether Wis. Stat. § 19.356(9) requires advance notification and a five-day delay before releasing a record that mentions the name of a person holding state or local public office in any way; and (2) whether the notice and delay requirement of Wis. Stat. § 19.356(9) applies only to records that fall within the categories in Wis. Stat. § 19.356(2)(a).²

¶ 2. In my opinion, the answer to both questions is no. A record mentioning the name of a public official does not necessarily “relat[e] to” that public official within the meaning of Wis. Stat. § 19.356(9)(a). Wisconsin Stat. § 19.356(9)(a) is not confined, however, to the types of records enumerated in Wis. Stat. § 19.356(2)(a).

¹All citations in this letter are to Wisconsin Statutes 2011-12.

²As a general matter, this issue of notice and delay applies only after an authority applies the standard public records analysis and determines that it has responsive records that must be released. See *Wisconsin Public Records Law* Wis. Stat. §§ 19.31-19.39 *Compliance Outline*, DOJ, 42 (Sept. 2012), <http://www.doj.state.wi.us/sites/default/files/dls/public-records-compliance-outline-2012.pdf>.

¶ 3. The operative language of Wis. Stat. § 19.356(9)(a) provides:

Except as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record containing information relating to a record subject who is an officer or employee of the authority holding a local public office or a state public office, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on the record subject, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under par. (b).

Subsection (b) goes on to provide that, within five days of receipt of the notice sent by the authority, “a record subject may augment the record to be released with written comments and documentation selected by the record subject,” and the authority must release the records “as augmented by the record subject.” Wis. Stat. § 19.356(9)(b).³

¶ 4. You first ask whether Wis. Stat. § 19.356(9) applies to any record that mentions a person holding state or local public office.

¶ 5. I begin with the plain language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutes must be read to have meaning, must be read in context, and their interpretation should not lead to absurd results. The Wisconsin Supreme Court has summarized the general framework for statutory interpretation as follows:

We assume that the legislature’s intent is expressed in the statutory language. . . .

Thus . . . statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specifically-defined words or phrases are given their technical or special definitional meaning.

³The five days are business days. Wis. Stat. § 19.356(9).

Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.

Kalal, 271 Wis. 2d 633, ¶¶ 44-46 (citations and quotation marks omitted).

¶ 6. The general rule is that notice to a record subject is *not* required. Wisconsin Stat. § 19.356(1) establishes that “no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject,” except as authorized in Wis. Stat. § 19.356.

¶ 7. Wisconsin Stat. § 19.356 provides two exceptions to the general rule. First, an authority must notify a record subject in three narrow circumstances provided by Wis. Stat. § 19.356(2). Second, Wis. Stat. § 19.356(9) provides that an authority must notify “a record subject who is an officer or employee of the authority holding a local public office or a state public office.” Wis. Stat. § 19.356(9)(a).⁴

¶ 8. Both exceptions use the term “record subject,” a term defined as “an individual about whom personally identifiable information is contained in a record.” Wis. Stat. § 19.32(2g). “Personally identifiable information,” in turn, is defined as “information that can be associated with a particular individual through one or more identifiers or other information or circumstances,” *see* Wis. Stat. § 19.62(5) (incorporated into the public records law by Wis. Stat. § 19.32(1r)), and includes an individual’s name.

⁴“Local public office” and “state public office” are defined for public records law purposes in Wis. Stat. § 19.32(1dm) and (4), which refer, respectively, to Wis. Stat. § 19.42(7w) and (13). This letter refers to these individuals as “public officials” for shorthand.

¶ 9. The Wis. Stat. § 19.356(9)(a) exception does not apply, however, to any record merely mentioning the name of a record subject. Instead, it applies only to records “containing information relating to a record subject.” Wis. Stat. § 19.356(9)(a). The mention of a public official’s name, standing alone, does not bring a record within the ambit of the exception. Several provisions in Wis. Stat. § 19.356 compel this result.

¶ 10. First, Wis. Stat. § 19.356(1) provides that the exceptions in both Wis. Stat. § 19.356(2) and (9) apply only when a record “contain[s] information pertaining to that record subject.” A record containing information pertaining to a public official must include more than a mention of his name. A prior attorney general opinion, construing that language in the course of interpreting Wis. Stat. § 19.356(2)(a), concluded that the word “pertain” requires more than a record containing personally identifiable information. Instead, a record would “pertain” to the person named in a subpoena or the person whose residence was the object of a search warrant, and the duty to notify would apply only to the release of such records. OAG-1-06 at 3 (Aug. 3, 2006). The opinion concluded: “[T]he mere fact that the record contains personally identifiable information about an individual, for example, the individual’s name, does not mean that individual is entitled to be notified that the record is proposed to be released.” OAG-1-06 at 3.

¶ 11. Like Wis. Stat. § 19.356(2)(a), Wis. Stat. § 19.356(9)(a) is subject to the limitation in Wis. Stat. § 19.356(1) providing that notice is required only for records “containing information pertaining to that record subject.” “Statutes relating to the same subject matter are to be construed together and harmonized.” *Wis. Bell, Inc. v. Pub. Serv. Comm’n*, 2004 WI App 223, ¶ 24, 277 Wis. 2d 729, 691 N.W.2d 697. The fact that the language in Wis. Stat. § 19.356(1) is common to Wis. Stat. § 19.356(2)(a) and (9)(a) counsels that they be read consistently. Wisconsin Stat. § 19.356(9)(a) thus also should be read as requiring notice only for records that relate or pertain to a public official in a substantive way.

¶ 12. Within Wis. Stat. § 19.356(9)(a) itself, the subsection is limited to records containing information “relating to” a record subject, language that echoes the “pertaining to” phrase in Wis. Stat. § 19.356(1). The Legislature could have, but did not, require notice regarding any record “containing personally identifiable information” about the public official. In addition, the provision applies only when the authority is the public official’s employer or office, a limitation also suggesting that the record must do more than mention the official’s name. While any authority

might have records mentioning the name of a public official, his employer or office is far more likely to have records that pertain directly to him.⁵

¶ 13. This reading is further confirmed by Wis. Stat. § 19.356(9)(b), which permits the public official to “augment the record to be released with written comments and documentation selected by the record subject.” Wisconsin Stat. § 19.356(9)(b) makes sense only if the record to be released relates in a substantive way to the public official. If the record simply mentions his name, there is no information to augment.

¶ 14. If Wis. Stat. § 19.356(9) exception were read to require notice regarding any record that mentions a public official’s name, the exception would almost swallow the rule. Although impossible to quantify, a large portion of records in the possession of authorities contain the name of a public official. For example, many state agencies include the name of their agency head on their letterhead and other documents. Requiring notice regarding any record bearing the public official’s name would require the authority to notify him and afford five days to augment such records. This would be an absurd result.

¶ 15. “[L]egislative history is sometimes consulted to confirm or verify a plain-meaning interpretation.” *Kalal*, 271 Wis. 2d 633, ¶ 51 (citation omitted). Wisconsin Stat. § 19.356(9) was created by 2003 Wis. Act 47. The Prefatory Note to Act 47 indicates that the law partially codifies *Woznicki v. Erickson*, 202 Wis. 2d 178, 193-94, 549 N.W.2d 699 (1996), and *Milwaukee Teachers’ Educational Ass’n v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999), cases concerned with the effect of the release of records on the interests of persons identified in the records and their privacy and reputation. 2003 Wis. Act 47, Joint Legislative Council Prefatory Note. A record that mentions a public official in passing, or simply lists his or her name, normally does not implicate such concerns.

¶ 16. Regarding your second question, you ask whether Wis. Stat. § 19.356(9) is limited to the three circumstances spelled out in Wis. Stat. § 19.356(2)(a). Wisconsin Stat. § 19.356(2)(a) provides that any record subject, whether a public official or not, is entitled to notice when:

⁵The Joint Legislative Council’s Note to 2003 Wis. Act 47, § 4, the act creating Wis. Stat. § 19.356(9), describes the records covered by that section as ones “containing information relating to the employment of the record subject.” 2003 Wis. Act 47, § 4, Joint Legislative Council Note.

Mr. Bill Lueders

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1. A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.

2. A record obtained by the authority through a subpoena or search warrant.

3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

¶ 17. Wisconsin Stat. § 19.356(9) is plain on its face. The provision makes no reference back to the specific types of records described in Wis. Stat. § 19.356(2)(a). Because the statute does not include the limits under Wis. Stat. § 19.356(2)(a), those limits should not be imposed after the fact. *See generally State v. Deborah J.Z.*, 228 Wis. 2d 468, 475-76, 596 N.W.2d 490 (Ct. App. 1999) (the omission of a provision from a similar statute concerning a related subject is significant in showing that a different intention existed). This interpretation is supported by the previous attorney general opinion. *See* OAG-1-06 at 8 ("Subsection (9)(a), however, does not restrict the duty to notify to the class of records listed in subsection (2)(a)[.]").

¶ 18. I conclude that a record mentioning a public official does not necessarily relate to a record subject within the meaning of Wis. Stat. § 19.356(9). Wisconsin Stat. § 19.356(9) is not limited, however, to the specific categories of records enumerated in Wis. Stat. § 19.356(2)(a).

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:DPL:CG:ajw



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

December 16, 2014

OAG—08—14

Mr. Matt Moroney
Deputy Secretary
Department of Natural Resources
101 South Webster Street
Box 7921
Madison, WI 53707-7921

Dear Mr. Moroney:

¶ 1. A “responsible unit” (RU) is the governmental entity that develops and implements recycling programs established under Wis. Stat. § 287.09. You have asked the following questions related to responsible units: (1) can a municipality member of a county RU leave the RU and establish itself as an independent RU more than ninety days after the date the county passed its resolution forming the county RU? (2) can a county RU dissolve, returning RU status to individual municipalities? and (3) if procedures for leaving an RU or dissolution are not defined by statute, should the Department of Natural Resources (“DNR”) or a local unit of government implement procedures for these changes through rulemaking or ordinance?

¶ 2. With regard to questions one and two, I conclude that the answer is no. Because the answers to questions one and two are no, I conclude with respect to question three that neither DNR nor local governments may establish procedures for RU withdrawal or dissolution.

¶ 3. Analysis begins with the plain language of the statute. *Rusk Cnty. Dep’t of Health & Human Servs. v. Thorson*, 2005 WI App 37, ¶ 4, 278 Wis. 2d 638, 693 N.W.2d 318. Section 287.09 first establishes, at subsection (1)(a), that each municipality is an RU except as otherwise provided in the statute:

(1) Designation of responsible units. (a) Except as provided in pars. (b) to (d), each municipality is a responsible unit.

¶ 4. Section 287.09(1)(b) then explains how a county may become an RU that includes municipalities within the county:

(b) A county board of supervisors may adopt a resolution designating the county a responsible unit. Except as provided in pars. (c) and (d), a county that has adopted such a resolution is the responsible unit for the entire county.

Section 287.09(1)(b) contains no provision for the dissolution of such RU after it has been established.

¶ 5. Section 287.09(1)(c) provides an opt-out procedure for municipalities that do not wish to become part of a county RU. A municipality may opt out of a county RU by adopting a resolution retaining its independent RU status within 90 days after the adoption of the county resolution creating the county RU:

(c) Within 90 days after the county board of supervisors adopts a resolution under par. (b), the governing body of a municipality that is located in part or in whole in the county may adopt a resolution retaining the municipality's status as a responsible unit.

Wis. Stat. § 287.09(1)(c). This is the sole authority governing opting out of an RU. However, Wis. Stat. § 287.09(1)(d) addresses the practical effect of the absence of alternative opt-out procedures. An RU that later wishes to not administer the recycling program for its geographical territory may contract with another unit of government, federally recognized Indian tribe or band, or a solid waste management system created under Wis. Stat. § 59.70(2) to perform recycling functions:

(d) The governing body of a responsible unit designated under par. (a), (b) or (c) may by contract under s. 66.0301 designate another unit of government, including a federally recognized Indian tribe or band in this state, or a solid waste management system created under s. 59.70(2) to be the responsible unit in lieu of the responsible unit designated under par. (a), (b) or (c). The contract shall cover all functions required under sub. (2), including provisions for financing and enforcing the recycling or other solid waste management program.

Wis. Stat. § 287.09(1)(d).

¶ 6. So the plain language of the statute includes specific provisions for (1) initially designating municipalities as RUs, (2) allowing a county to become an RU, (3) permitting municipalities to opt out of a county RU, and (4) sharing and shifting

of RU duties by contract. In contrast to these specific procedures, there is no provision for a municipality to opt out of a county RU, and no provision through which a county may dissolve a county RU.

¶ 7. Where a statutory scheme specifically enumerates specific powers and procedures, the absence of provision for additional powers is evidence of legislative intent not to confer those powers. *See State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974); *Gottlieb v. City of Milwaukee*, 90 Wis. 2d 86, 95, 279 N.W.2d 479 (Ct. App. 1979) ("The rule is that if a statute provides one thing, a negative of all others is implied."). Here, under that canon, the specific procedures for the creation of RUs and the time limit to opt out of an RU indicate legislative intent not to permit opt-out at a later date. Interpreting the statute to include alternative procedures would render the 90-day time limit meaningless.

¶ 8. This conclusion is also supported by practical implications of RU designation. Complying with chapter 287 of the Wisconsin Statutes may require construction of expensive infrastructure. Allowing a municipality to withdraw after the 90-day statutory limit could seriously interfere with the county's budgeting and planning. Likewise, allowing dissolution of a county RU could leave municipalities within that RU unexpectedly without a facility to handle their waste management needs.

¶ 9. This reading is consistent with interpretive commentary by DNR near the time the statute was enacted. While such interpretive commentary is not in itself a dispositive as to a statute's meaning, the Wisconsin Supreme Court has favorably considered interpretive commentary from DNR on matters within its sphere of administrative authority when consistent with a statute's plain meaning and statutory history. *See Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 17, 316 Wis. 2d 47, 762 N.W.2d 652 (giving weight to DNR's interpretation of a forest fire statute). DNR is vested with authority relating to implementation of the recycling requirements of chapter 287 of the Wisconsin Statutes. *See, e.g.*, Wis. Stat. § 287.03 (including rulemaking, research, technical assistance, and educational programs).

¶ 10. In 1990, DNR published guidance on forming an RU, specifically addressing whether a county may dissolve one:

Is responsible unit status permanent?

No. A county or municipality may at any time enter into intergovernmental agreements to share responsible unit duties and revenues. Note however, that the recycling law does not provide for

reversal of a resolution whereby the county declares itself to be a responsible unit. Nor are there any provisions for reversal of a municipal resolution passed within 90 days of a county resolution. Note also that a municipality need not pass a resolution in order to be a responsible unit unless the county does. Nonetheless, new arrangements are always a possibility for realigning responsible unit boundaries.

. . . .

What can we do if, today, we want to be a responsible unit but we are unsure about five or ten years down the road?

Consider the law's provisions for intergovernmental contracts. Such contracts can include expiration dates, renewal procedures and enough detail to assure that all parties deliver what was agreed upon. If, in the future, such a contract is not renewed, the responsible unit status falls back to the municipalities or to a county who would then be free to either continue on their own or form new contractual arrangements.

(DNR, PUBL-IE 044-90, Forming a responsible unit under Wisconsin Act 355: The recycling law 1-2 (June, 1990)).

¶ 11. This commentary indicates that county RUs may not be dissolved, and municipalities may not withdraw from county RUs, more than 90 days after establishment. DNR advised that counties and municipalities should instead make rearrangements through intergovernmental contracts under Wis. Stat. § 287.09(1)(d).

¶ 12. The meaning of a statute's plain language is also confirmed by its legislative history. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110 ("legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation"). The legislative history of Wis. Stat. § 287.09 indicates that omission of the procedures addressed in your question was not inadvertent.

¶ 13. Current Wis. Stat. § 287.09 is the successor to Wis. Stat. § 159.09. Section 159.09 was enacted by 1989 Wisconsin Act 335. Act 335, in turn, was the result of 1989 Senate Bill 300, which was introduced by the Wisconsin Legislative Council. Senate Bill 300 included the basic structure of RU formation that exists today. Subsequent amendments have updated section numbers and recognized that a federally recognized Indian tribe or band may contract with RUs, but the RU formation process has remained unchanged.

¶ 14. Documents of the Wisconsin Legislative Council related to Senate Bill 300 give insight into the RU designation process. Those documents include "Drafting Instructions for the Central Structure of a Comprehensive Statewide Recycling Program." The drafting instructions indicate that drafters of the statute were to consider and identify what units of government were to be responsible for implementing the new rules,

IV. COUNTY DUTIES

- A. By July 1, 1990, identify which units of government, either the county or the municipalities within the county, will be responsible for implementing the various components of comprehensive local recycling programs which meet the state goals, i.e., collection, separation, storage and marketing of recovered materials and education and promotion.

Wis. Legislative Council, Resource Recovery Memo No. 6 (Dec. 9, 1988).

¶ 15. The process of assigning and managing RU responsibility was contemplated by the drafters of the statute; the drafters treated decisions about forming and joining an RU as permanent.

¶ 16. A later memo, entitled "Recommendations of the Municipal Responsibilities Working Group," discussed alternative mechanisms to leaving or dissolving an RU:

4. a. Establish two mechanisms for shifting the responsibility to develop and implement a recycling program from municipalities to a county: (i) authorize a county to develop and implement a recycling program in lieu of or in conjunction with municipal programs unless the governing bodies of the municipalities representing at least 50% of the population of the county reject the county program; and (ii) direct a county to develop and implement a recycling program in lieu of or in conjunction with municipal programs if the governing bodies of the municipalities representing at least 50% of the population of the county petition the county to do so.

b. Allow a municipality in a county which develops and implements a program under par. a, except a municipality whose governing body voted under par. a (ii), to petition the county to develop and implement the program, to develop and implement a program of its own.

Establish that such a municipality is not required to participate in the county program.

Wis. Legislative Council, Resource Recovery Memo No. 12 (April. 5, 1989). These recommendations discussed two specific mechanisms through which RUs may shift responsibility. The discussion included no mechanism for dissolution of a county RU or withdrawal of a municipality after 90 days. The most sensible reading of the legislative history supports the conclusion that there is no procedure for a county RU to dissolve, or for a municipality to leave a county RU.

¶ 17. Your third question asks whether DNR or counties should define procedures for a municipality to leave an RU or a county RU to dissolve if there is no statutory procedure. I conclude that neither DNR nor local governments may create procedures for a local municipality member of a county RU to leave the county RU more than 90 days after the date that the county RU is formed, or for a county RU to dissolve.

¶ 18. Administrative agencies may promulgate rules only to the extent enabled by statute. “[A]gencies have only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates.” *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep’t of Natural Res.*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612 (internal citations and quotations omitted). Wisconsin Stat. § 287.03 enables DNR to promulgate rules necessary to implement the provision of chapter 287, but not to go beyond the scope of the statutes, or implement processes inconsistent with that chapter. *See Wis. Stat. § 227.11(2)(a)*. Because I conclude that chapter 287 includes no process for a municipality to leave a county RU more than 90 days after establishment of the county RU or for the dissolution of a county RU, I also conclude that DNR may not promulgate rules to create such a process.

¶ 19. Similarly, local governments have only the rulemaking authority granted by legislature. *Ecker Bros. v. Calumet Cnty.*, 2009 WI App 112, ¶ 18, 321 Wis. 2d 51, 772 N.W.2d 240; *Conway v. Bd. of Police & Fire Comm’rs of Madison*, 2003 WI 53, ¶¶ 28-29, 262 Wis. 2d 1, 662 N.W.2d 335 (“In order for the [Board’s rule] to be a valid exercise of administrative power, it is necessary that such action: (1) be based upon a proper delegation of power by the legislature, and (2) not constitute an administrative action in excess of that statutorily conferred authority.”). Because Wis. Stat. ch. 287 creates no authority for local governments to dissolve an RU or to leave a county RU 90 days after the county’s resolution forming the RU, the creation of such procedures by a local government would be outside the authority delegated to it.

Mr. Matt Moroney
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¶ 20. Wisconsin Stat. § 287.09(1)(d) provides some flexibility in how an RU meets its waste management obligations. An RU may contract with other permissible entities for waste management obligations pursuant to Wis. Stat. § 287.09(1)(d). For example, a municipality that has opted to retain RU status after its county elected to become an RU may contract with the county. Likewise, a county RU may contract with other counties, municipalities, a federally recognized Indian tribe or band in this state, or a solid waste management system created under Wis. Stat. § 59.70(2).

¶ 21. I conclude that Wis. Stat. ch. 287 provides no authority for a local municipal member of a county RU to leave the RU more than 90 days after the date that the RU was formed, or for a county RU to dissolve. Neither DNR nor county or local governments may establish such procedures through rulemaking or ordinance. An RU may, however, contract with other permissible entities for the handling of its waste management obligations pursuant to Wis. Stat. § 287.09(1)(d).

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:CG:SMM:jrs



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

December 16, 2014

OAG—09—14

Mr. Brad D. Schimel
District Attorney
Waukesha County Courthouse
515 West Moreland Boulevard, Room CG-72
Waukesha, WI 53188

Dear Mr. Schimel:

¶ 1. You have requested an opinion on whether an alderman in the City of Oconomowoc who owns a partial interest in properties in the city would violate Wis. Stat. § 946.13(1)(a) even if he abstains from voting on zoning decisions relating to the properties. Specifically, the alderman owns a partial interest in two properties with a zoning application pending with the city, one for a zoning variance and one for a conditional use permit.

¶ 2. I conclude that the alderman would not be in violation of Wis. Stat. § 946.13(1)(a) because the statute does not apply to a public official's involvement in a municipality's exercise of its zoning powers, which includes granting zoning variances and conditional use permits. See *Town of Rhine v. Bizzell*, 2008 WI 76, ¶¶ 55-57, 311 Wis. 2d 1, 751 N.W.2d 780, (conditional use permits); *State v. Waushara Cnty. Bd. of Adjustment*, 2004 WI 56, ¶ 33, 271 Wis. 2d 547, 679 N.W.2d 514 (zoning variances). By its terms, the statute applies only to public officials who have private interests in public "contracts," specifically to a public officer or public employee who "[i]n the officer's or employee's private capacity, negotiates or bids for or enters into a contract." Wis. Stat. § 946.13(1)(a). The statute does not apply to a municipality's exercise of its zoning powers, such as granting or denying zoning variances or conditional use permits, because zoning decisions are not "contracts" within the meaning of Wis. Stat. § 946.13(1)(a).

¶ 3. As the Wisconsin Supreme Court requires, I begin with the plain language of the statute and the inquiry stops "[i]f the meaning of the statute is plain." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common,

ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.*

¶ 4. Wisconsin Stat. § 946.13(1)(a) makes it a Class I felony if:

Any public officer or public employee

(a) In the officer’s or employee’s private capacity, negotiates or bids for or enters into a contract in which the officer or employee has a private pecuniary interest, direct or indirect, if at the same time the officer or employee is authorized or required by law to participate in the officer’s or employee’s capacity as such officer or employee in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on the officer’s or employee’s part

¶ 5. An element “for the offense of holding a private interest in a public contract” under Wis. Stat. § 946.13(1)(a) is that “the defendant negotiated (or bid for or entered into) a contract in a private capacity.” *State v. Venema*, 2002 WI App 202, ¶ 15, 257 Wis. 2d 491, 650 N.W.2d 898. Because the word “contract” is not defined in the statute, it must be given its “common, ordinary, and accepted meaning.” *Kalal*, 271 Wis. 2d 633, ¶ 45. In Wisconsin, a contract is defined as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” *Steele v. Pacesetter Motor Cars, Inc.*, 2003 WI App 242, ¶ 11, 267 Wis. 2d 873, 672 N.W.2d 141 (internal quotation omitted). “The elements of a contract are offer, acceptance, and consideration.” *In re F.T.R.*, 2013 WI 66, ¶ 57, 349 Wis. 2d 84, 833 N.W.2d 634.

¶ 6. Under Wisconsin law, a municipality’s zoning decision is not a contract. The zoning municipality does not make an agreement with the zoned property owner in exchange for consideration, which is enforceable by either side in a breach of contract lawsuit. Instead, zoning is a police power to be exercised for the health, safety, morals, and general welfare of the community. *See* Wis. Stat. §§ 59.69(1) (counties), 60.61(1)(a)-(b) (towns), 61.35 (villages), and 62.23(7)(am) (cities). Under this power, a municipality “may regulate and restrict buildings in height and size, the percentage of the lot which they may occupy, the size of yards, open spaces, density of population and the location and use of buildings and land for trade, industry, residences or other purposes.” *Step Now Citizens Grp. v. Town of Utica Planning & Zoning Comm.*, 2003 WI App 109, ¶ 25, 264 Wis. 2d 662, 663 N.W.2d 833. Municipalities do not enforce zoning violations through breach of contract lawsuits. Instead, they enact zoning ordinances that provide for forfeitures,

finer, or civil penalties for violations. *See, e.g.*, Wis. Stat. §§ 56.69(11), 60.61(6), 61.35, and 62.23(7)(f). In fact, it is illegal under Wisconsin law for municipalities to make zoning decisions by contract with a property owner. *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 28, 174 N.W.2d 533 (1970) ("A contract made by a zoning authority to zone or rezone or not to zone is illegal and the ordinance is void because a municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers."). For these reasons, a municipality's zoning decision is not a "contract" under Wis. Stat. § 946.13(1)(a) and therefore the statute does not apply to an official's participation in a zoning decision.

¶ 7. This opinion does not address whether the alderman can vote on the potential "modification of a previously existing development agreement with regard to the subdivision" mentioned in the statement of facts attached to your request. Because the statement of facts does not state the relevant facts of this development agreement, such as the parties to the agreement or its terms, I cannot offer an opinion on whether a negotiation to modify or modification of the development agreement would implicate Wis. Stat. § 946.13(1)(a). Given that Wis. Stat. § 946.13(1)(a) requires the negotiation, bidding or entering into a contract, however, there could be no violation relating to this development agreement if there are no modifications to, or negotiations or bidding relating to, the development agreement.

¶ 8. This opinion interprets only Wis. Stat. § 946.13(1)(a). It does not analyze whether the alderman would need to recuse himself, or take any other actions, in order to comply with other laws when the City of Oconomowoc considers zoning issues relating to the properties in which he has an ownership interest.

Sincerely,

A handwritten signature in blue ink, appearing to read "J.B. Van Hollen", is written over the typed name.

J.B. VAN HOLLEN
Attorney General

JBV:BPK:mlk



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

December 16, 2014

OAG—10—14

Mr. Jeffrey J. Siewert
Corporation Counsel
Waupaca County
811 Harding Street
Waupaca, WI 54981

Dear Mr. Siewert:

¶ 1. You ask whether forms called Physician Orders for Life-Sustaining Treatment ("POLST") are legal and valid in Wisconsin. You have included a sample of this form, on which a person may communicate wishes about medical care in the event of incapacitation.

¶ 2. Because the legality and validity of a POLST form in a particular context would depend on the facts and circumstances presented, this opinion does not address the legality of POLST forms as a general matter. Instead, this opinion addresses two specific questions: (1) whether the civil and criminal immunity for healthcare providers who rely on certain statutory instruments (including declarations to physicians, do-not-resuscitate orders, or healthcare power-of-attorney instruments) applies to providers who rely on POLST forms; and (2) whether POLST forms may be considered for any other purpose, such as evidence of an individual's medical wishes in a judicial proceeding. I conclude that a POLST form would not confer the immunity provided by Wisconsin's statutory instruments, but that, depending on the circumstances, such a form might be evidence of an individual's healthcare wishes.

¶ 3. The POLST form you attach provides checkboxes where a person may indicate whether he or she wishes to receive artificially administered fluids and nutrition, whether to resuscitate when without a pulse and not breathing, and whether antibiotics should be withheld and to what extent. It also contains treatment options for when a patient has a pulse or is breathing, but is incapacitated: "comfort measures only," "limited additional interventions," or "aggressive treatment," which are defined to a certain extent on the form. The form requires the signature of a physician or a nurse practitioner, but requires no

patient's signature or witnessing for a patient's signature. The form also states no prerequisites to using the form, such as having a terminal condition.

¶ 4. Wisconsin statutes provide three instruments through which an individual may state his healthcare wishes in the event of incapacitation: a "declaration to physicians," "do-not-resuscitate order," and "health care power of attorney." Wis. Stat. §§ 154.03, 154.19, 155.10. These statutory instruments apply under specific circumstances, have their own signature requirements, and may be limited in the extent of authorization they afford.

¶ 5. A declaration to physicians addresses the withholding or withdrawal of life-sustaining procedures and feeding tubes for persons in a terminal condition or persistent vegetative state, as verified by two physicians who have personally examined the individual. Wis. Stat. §§ 154.02(3), 154.03(1). It must be signed by the declarant when of sound mind, or by a proxy if the declarant is physically unable to sign. Wis. Stat. § 154.03(1). It also must be witnessed by two disinterested, non-relative witnesses who are not the individual's healthcare provider. Wis. Stat. § 154.03(1)(a)-(d). The declarant may not authorize withholding life-sustaining procedures that an attending physician advises will cause pain or reduce comfort that cannot be alleviated through pain relief measures. Wis. Stat. § 154.03(1).

¶ 6. A do-not-resuscitate order applies to persons with a terminal condition or a medical condition under which cardiac or pulmonary resuscitation would either fail to prevent death or would cause significant physical harm or pain that would outweigh the possible benefits of resuscitation. Wis. Stat. § 154.17(4). It must be signed by the patient unless a qualified individual is incapacitated and the individual's guardian or healthcare agent consents and signs the order on the individual's behalf. Wis. Stat. §§ 154.19(1)(d), 154.225(2). Written information about the resuscitation procedures must be disclosed to the patient, and a do-not-resuscitate bracelet must be provided and worn. Wis. Stat. §§ 154.17(1), 154.19(2).

¶ 7. The third mechanism, healthcare power of attorney, may be bestowed on a healthcare agent in the event of incapacitation. It is not specifically limited to particular medical conditions. *See* Wis. Stat. § 155.05. However, it must be signed by the patient, or at the patient's direction, when he or she is of sound mind and must be witnessed by two disinterested, non-relative witnesses who are not the individual's healthcare provider. Wis. Stat. §§ 155.05(1), 155.10. The agent may not consent to withhold or withdraw feeding tubes if it will cause pain or reduce comfort, and may consent to the withholding of orally ingested nutrition or

hydration only if provision of the nutrition or hydration is medically contraindicated. Wis. Stat. § 155.20(4).

¶ 8. Where a healthcare provider relies on one of these types of instruments in withholding or withdrawing treatment, the statutes provide criminal and civil immunity. Each statutory instrument provides for its own specific immunity. The declaration-to-physicians law provides:

No physician, inpatient health care facility or health care professional acting under the direction of a physician may be held criminally or civilly liable, or charged with unprofessional conduct, for any of the following:

1. Participating in the withholding or withdrawal of life-sustaining procedures or feeding tubes *under this subchapter*.

Wis. Stat. § 154.07(1)(a). Similarly, the do-not-resuscitate law states that “[n]o physician, emergency medical technician, first responder, health care professional or emergency health care facility may be held criminally or civilly liable” when, “[u]nder the directive of a do-not-resuscitate order, withholding or withdrawing, or causing to be withheld or withdrawn, resuscitation from a patient.” Wis. Stat. § 154.23. A “do-not-resuscitate order” is defined as “a written order issued under the requirements of *this subchapter*.” Wis. Stat. § 154.17(2). Finally, the health care power-of-attorney law provides that “[n]o health care facility or health care provider may be charged with a crime, held civilly liable or charged with unprofessional conduct for . . . [c]omplying . . . with the terms of a power of attorney for health care instrument *that is in compliance with this chapter*.” Wis. Stat. § 155.50(1)(c).

¶ 9. The POLST form you have provided does not satisfy the statutory criteria for any of these instruments. It is unlike a declaration to physicians because it is not preconditioned on a terminal condition or persistent vegetative state, does not require verification of those conditions by two physicians, lacks the requirement for witnessing of the principal’s (or a proxy’s) signature, and would allow withholding of procedures even if it would lead to pain or discomfort. It is unlike a do-not-resuscitate order because it is not preconditioned on a terminal condition or finding about the inadequacy of cardiac or pulmonary resuscitation, lacks the signing requirement by a qualified patient or by a guardian or healthcare agent, and does not require a bracelet or that information about resuscitation be disclosed. And the POLST is unlike the healthcare power of attorney because it lacks the requirement for witnessing of the principal’s, or a proxy’s, signature and does not

prohibit withholding feeding tubes if it would cause pain or discomfort or withholding orally ingested nutrition or hydration if medically indicated.

¶ 10. Accordingly, because the statutes mandate that an instrument comply with the statutory requirements before immunity will apply, and in the absence of any other statutory or judicially created immunity, I conclude that reliance on a POLST form would not trigger immunity for a healthcare provider.

¶ 11. You also ask whether a POLST form is automatically invalid for all other purposes, such as evincing consent to a treatment. You ask what effect, if any, a POLST form may be given in court proceedings. I conclude that there is no absolute bar to a court considering a POLST form as evidence of a person's wishes about medical care. Rather, whether a form is properly considered will depend on the circumstances.

¶ 12. There are two main considerations. First, the statutes do not expressly forbid considering a POLST form as evidence of a person's wishes. Second, the Wisconsin Supreme Court has left open the possibility that evidence other than the statutory instruments may be considered.

¶ 13. First, a failure to execute a statutory instrument creates no presumption about the person's wishes. For example, the absence of a declaration "creates no presumption that the person consents to the use or withholding of life-sustaining procedures or feeding tubes in the event that the person suffers from a terminal condition or is in a persistent vegetative state." Wis. Stat. § 154.11(5). Similar language also appears with the other laws. See Wis. Stat. § 154.25(5) (no presumption in the absence of a do-not-resuscitate order); Wis. Stat. § 155.70(8) (no presumption in the absence of a healthcare power-of-attorney instrument). In addition, the declaration to physicians and do-not-resuscitate laws state that the statutory mechanisms do not impair "other rights" a person has "to withhold or withdraw life-sustaining procedures or feeding tubes" or "to withhold or withdraw resuscitation." Wis. Stat. §§ 154.11(4), 154.25(4). Accordingly, the statutes leave open the possibility that, in the absence of a statutory instrument, other evidence of a person's intent might be considered.

¶ 14. Second, Wisconsin Supreme Court cases also leave open the possibility of other evidence. *In the Matter of Guardianship of L.W.*, 167 Wis. 2d 53, 482 N.W.2d 60 (1992), addressed whether an incompetent individual in a persistent vegetative state had the right to refuse life-sustaining medical treatment, such as artificial nutrition and hydration. See *id.* at 63. The court addressed whether a

guardian may exercise that right on the incompetent person's behalf. *See id.* The court concluded that an incompetent person in a persistent vegetative state has a constitutionally protected right to refuse that treatment, and that a guardian may consent to withdrawal, where it is determined that it is in the "best interests" of the ward. *Id.*

¶ 15. The ward in *L.W.* had not executed any statutory instrument, but the court recognized that a failure to take advantage of the statutes does not create a presumption regarding intent. *Id.* at 69-70, 75. The court went on to indicate that it would have considered whether L.W. had "expressed his wishes" in other ways, "as far as they can be discerned." *See id.* at 78-79. It turned out, however, that L.W. had not expressed his wishes in any manner. *See id.* at 78-80.

¶ 16. *In the Matter of the Guardianship and Protective Placement of Edna M.F.*, 210 Wis. 2d 557, 563 N.W.2d 485 (1997), addressed the problem of discerning intent in determining whether a court-appointed guardian could withdraw artificial nutrition and hydration. In the course of that discussion, the court described ways to glean intent more broadly than by reference to statutory documents: "it is not in the best interests of the ward to withdraw life-sustaining treatment, including a feeding tube, unless the ward has executed an advanced directive *or other statement clearly indicating his or her desires.*" *Id.* at 567-68 (emphasis added). Along similar lines, the court went on to conclude that, "if her guardian can demonstrate by a preponderance of the evidence a clear statement of Edna's desires in these circumstances, then it is in the best interests of Edna to honor those wishes." *Id.* at 569 (footnote omitted).

¶ 17. Accordingly, the statutes and cases do not prohibit other evidence of intent. Whether a particular expression is sufficiently clear, addresses the correct circumstances, and is not otherwise objectionable under the law or rules of evidence, would depend on the circumstances of a particular case. Depending on all the facts and circumstances, a court might determine that a POLST form provided evidence of the person's intent.

Mr. Jeffrey J. Siewert
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¶ 18. In sum, I conclude that a POLST form will trigger no statutory immunities for healthcare providers where it lacks the features of statutory documents such as a declaration to physicians, do-not-resuscitate order, or healthcare power of attorney. A court might conclude, however, that a POLST form is relevant in discerning a person's intent.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBV:ADR:mlk



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

December 19, 2014

OAG—11—14

Mr. Robin Vos
Chairman
Assembly Committee on Organization
State Capitol
Post Office Box 8952
Madison, WI 53708

Dear Representative Vos:

¶1. In your capacity as Chairman of the Assembly Committee on Organization, you ask whether Wis. Stat. § 710.02(1), limiting the acreage in Wisconsin land that may be acquired, owned, or held by nonresident aliens and foreign corporations, applies to Members of the General Agreement on Trade in Services (GATS), an international agreement of which the United States of America is a Member.¹ You point out that the GATS directs its Members to accord to the services and service suppliers of all other Member nations “treatment no less favourable than it accords to its own like services and service suppliers.” GATS art. XVII:1.² You also note that Wis. Stat. § 710.02(2)(b) exempts “[c]itizens, foreign governments or subjects of a foreign government whose rights to hold larger quantities of land are secured by treaty” from the acreage limitation.

¶2. I conclude that Wis. Stat. § 710.02(1) is generally inapplicable to GATS Members, their services, or their service suppliers to the extent they seek to acquire, own, or hold land for enumerated service-related uses. First, the aim of the GATS is to remove barriers to international trade in services, while the aim of the statute is to prevent large-scale ownership of land by nonresident aliens for agricultural and forestry purposes. The statute achieves this goal by prohibiting nonresident alien ownership of more than 640 acres of land for agricultural or forestry use. Meanwhile, separate provisions in the statute allow nonresident alien land ownership, with no acreage limitation, for most service-based (non-agricultural

¹“Member” is the term used to identify a nation participating in the World Trade Organization Agreement and other agreements, such as the GATS, engendered by the WTO. See 19 U.S.C. §§ 1677(30), 3501(10).

²The full cite is: General Agreement on Trade in Services art. XVII(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B.

and non-forestry) purposes. Thus, as long as the nonresident alien will use Wisconsin land for a permissible service-based purpose (and not agriculture or forestry), the statutory acreage limitation does not apply. Second, even if the statute's acreage limitation did apply, GATS Members and their service suppliers are exempted from the acreage limitation by the statute's treaty exception with respect to the acquisition, ownership, or holding of land for purposes enumerated in the GATS.

Wis. Stat. § 710.02.

¶3. Wisconsin Stat. § 710.02(1) prohibits nonresident aliens from "acquir[ing], own[ing] or hold[ing] any interest . . . in more than 640 acres of land in this state." The earliest version of the law was enacted in 1887. See Wis. Stat. § 2200a (1889); 1887 Wis. Laws ch. 479. The 1887 enactment was one of the many "alien land laws" that swept the country "at that time stemming from what was regarded as undesirable results from nonresident alien ownership of large tracts of land." *Lehndorff Geneva, Inc. v. Warren*, 74 Wis. 2d 369, 386, 246 N.W.2d 815 (1976).³ The statute was an instrument of agricultural protectionism, born in "a period of agricultural discontent in which legislatures feared 'the large scale engrossment of farm land by absentees,' with resentment directed against both aliens and corporations." *Id.* at 386 n. 32 (citation omitted). Eventually, this concern for agricultural land use extended to forestry uses as well. See 1983 Wis. Act 335, § 1; Wis. Stat. § 710.02(3).

¶4. There are exceptions to the acreage limitation. Since 1953, nonresident alien "[r]ailroad or pipeline corporations" have been allowed to acquire land in Wisconsin without limitation. Wis. Stat. § 710.02(2)(c).⁴

¶5. In 1983, two more exceptions were adopted. First, nonresident alien entities may now freely acquire land for these purposes: "exploration mining lease . . . and land used for mining and associated activities"; "[l]eases for exploration or production of oil, gas, coal, shale and related hydrocarbons, including by-products of the production, and land used in connection with the exploration or production";

³In *Lehndorff*, a corporation wholly owned by West German citizens attempted to purchase more than 640 acres of Wisconsin land for agricultural use. The company sought a declaratory judgment that Wis. Stat. § 710.02 violated the Treaty of Friendship, Commerce and Navigation between the United States and West Germany. The court concluded that Wisconsin's acreage limitation was permitted by treaty language reserving to each party the right to limit the other party's ability to acquire land for agricultural purposes. *Lehndorff*, 74 Wis. 2d at 3775-76.

⁴See 1953 Wis. Laws ch. 55, amending Wis. Stat. § 234.23 (1953).

and specified manufacturing and mercantile activities. Wis. Stat. § 710.02(2)(d)-(g). The manufacturing and mercantile categories, referenced in subsections (e) and (f), are extremely broad, embracing almost every conceivable business activity.⁵ Activities relating to agriculture and forestry are expressly not included in the manufacturing and mercantile exemptions.⁶ Thus, with these categorical exemptions, the statute now allows nonresident alien ownership of more than 640 acres of land for most *non-agricultural* and *non-forestry* purposes.

¶6. The second exception added by the 1983 Act eliminates the acreage limitation for: “Citizens, foreign governments or subjects of a foreign government whose rights to hold larger quantities of land are secured by treaty.” Wis. Stat. § 710.02(2)(b). There is no legislative history explaining the reason for the treaty exception, but the Act expresses the legislature’s desire to remove barriers to foreign investment while continuing to limit the right to use more than 640 acres of land for agricultural or forestry to resident landowners:

Legislative declaration. The legislature recognizes the need to modify this state’s restrictions on land ownership by nonresident alien and foreign business corporations and entities, so as to remove barriers to foreign investment in energy, mining, manufacturing and mercantile activities. Although this act removes acreage limits on land ownership by such persons for certain purposes, it is the legislature’s intent that these liberalized provisions and exceptions be strictly construed, so as to continue to limit alien ownership of land used for agricultural or forestry purposes to not more than 640

⁵See 1983 Wis. Act 335. The specified manufacturing and mercantile activities are those catalogued in divisions C-I of “the standard industrial classification manual published by the U.S. printing office, 1972 and later editions.” Wis. Stat. § 710.02(2)(e), (f). The divisions from the manual incorporated in the statute include a wide variety of commercial activities, including fifteen enumerated types of “Services,” and a list of additional “Miscellaneous services.” Exec. Office of the President, Office of Mgmt. & Budget, *Standard Industrial Classification Manual* 7-9, 53-406 (1987) (“SIC Manual”). The last print version of the SIC Manual was published in 1987. It was superseded in 1997 by the Exec. Office of the President, Office of Mgmt. & Budget, *North American Industrial Classification System* (2012) (“NAICS”). Updated editions of the bound NAICS appeared regularly between 1997 and 2012. Since 2012, NAICS updates can be found online at www.census.gov/eos/www/naics

⁶The divisions of the SIC Manual *not* incorporated in the statute are Division A: Agriculture, Forestry, And Fishing; Division B: Mining; and Division J: Public Administration. *SIC Manual* 7, 9, 21-52, 407-19.

acres. The legislature further declares that the exception granted to manufacturing activities shall not be construed to allow agricultural or forestry operations to be undertaken for purposes of supplying raw materials to such manufacturing activities.

1983 Wis. Act 335, § 1.

General Agreement on Trade in Services.

¶7. The history of the GATS begins with the General Agreement on Tariffs and Trade (GATT), a multilateral trade agreement created after World War II. *See* 19 U.S.C. § 3501(1); *China Liquor Distrib. Co. v. United States*, 343 F.2d 1005, 1006 (C.C.P.A. 1964). The intent of the GATT was to liberalize international trade by reducing discriminatory and protectionist tariffs and eliminating other trade barriers. The GATT has been amended over the years through a series of multilateral trade negotiations known as "rounds."

¶8. The Uruguay Round (1986-1994) established the World Trade Organization, the successor to the GATT. *See* 19 U.S.C. § 3501(8). It also produced the GATS, a multilateral agreement binding all WTO Members. *See* 19 U.S.C. § 3511(d)(14). As its name indicates, the GATS is specifically concerned with trade in *services*.

The scope of the GATS is enormous; it covers virtually all types of services in almost all major countries. . . . The only services that the GATS explicitly excludes are government-provided. The GATS categorizes all other services into twelve sectors: business; communication; construction and engineering; distribution; educational; environmental; financial; health related and social; tourism and travel related; recreational, cultural and sporting; transport; and other services not included elsewhere. The business services sector is divided into five sub-sectors: professional, computer, research and development, real estate, rental/leasing, and other business services.

Eve Ross, Comment, *A Venerable Profession Enters the Global Economy: South Carolina Lawyers and the General Agreement on Trade in Services (GATS)*,

57 S.C. L. Rev. 969, 975-76 (2006) (footnotes omitted) (catalogue of services derived from World Trade Organization, *Services Sectoral Classification List* (1991)).

¶9. The GATS is a Congressional-Executive agreement. See Proclamation No. 6763, 60 Fed. Reg. 1007 (Dec. 23, 1994); Ross, 57 S. Car. L. Rev. at 975. Congressional-Executive agreements are “simply acts of Congress, ordinary legislation which enacts an international obligation by a majority vote of both the House and Senate, with the President’s signature.” *Id.* (quoting David J. Bederman, *International Law Frameworks* 167 (2001)); *accord Made in the USA Found. v. United States*, 242 F.3d 1300, 1305 n.12 (11th Cir. 2001); Restatement (Third) of Foreign Relations Law of the United States § 303(2) & cmt. e. & notes 7-9 (1987) (hereinafter Restatement). Notably, Congressional-Executive agreements have become the preferred mode for trade agreements. See *Made in the USA*, 242 F.3d at 1305 n.12; Restatement § 303, note 9 (trade agreements “are now commonly effected by Congressional-Executive agreement, in recognition of the special role of the House of Representatives in the raising of revenue”).

¶10. Every GATS Member “uses a schedule of specific commitments to customize how the GATS will apply to them.” Ross, 57 S.C. L. Rev. at 978. Each individual “Schedule of Specific Commitments,” is “annexed to [the GATS] and . . . form[s] an integral part thereof.” GATS art. XX. In this Schedule, the Member lists the “service sectors” it has agreed to include in its GATS commitments. The United States’ Schedule includes business services, educational services, environmental services, financial services, health related and social services, tourism and travel related services, and transport services. The United States of America, Schedule of Specific Commitments at 15-73, Apr. 15, 1994 (hereinafter U.S. Schedule). Several of these service sectors are further subdivided into “subsectors.” See *id.* Among the business service subsectors are “Services Incidental to Agriculture, Hunting and Forestry (except provision of agriculture machinery with drivers and crew, harvesting and related services, services of farm labour contractors and aerial fire fighting).” *Id.* at 39.⁷ Services “incidental” to agriculture and forestry

⁷Given the parenthetical exceptions, it is unclear what services incidental to agriculture and forestry are envisioned here. The General Counsel for the United States Trade Representative (whose office is responsible for implementing the GATS) is unable to answer that question definitively, but explains that services “incidental” to a given activity are distinct from but unique to that activity. He suggests that services incidental to agriculture might include “animal boarding, care and breeding services, services to promote propagation, growth and output of animals,” and that services incidental to forestry might include “timber evaluation, . . . [and] forest management including forest damage assessment services.” This list is taken from Department of International Economic and

notwithstanding, the use of land for agriculture or forestry more generally does not constitute a “service” and does not appear in the U.S. Schedule of GATS-protected service sectors and subsectors.

¶11. The GATS requires “national treatment.” GATS art. XVII:1. “ ‘National treatment means that foreign nationals should be given the same treatment in each of the member countries as that country makes available to its own citizens.’ ” *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 162 (2nd Cir. 2007) (citations omitted). The GATS allows each Member to maintain laws or “[m]easures” inconsistent with the national treatment mandate by explicitly acknowledging the inconsistency in its Schedule of Specific Commitments. GATS art. XX. These inconsistent laws or measures are listed as “Limitations on National Treatment” in the U.S. Schedule.⁸ The Schedule includes several federal and state laws restricting alien land ownership. *See* U.S. Schedule at 7-8. Although several limitations arising from Wisconsin law are included in the Schedule, Wis. Stat. § 710.02 is not one of them. *See* U.S. Schedule at 34, 56, 59-61, 65, 68.

¶12. A state law that is both inconsistent with the GATS and not included in the Schedule of Specific Commitments is not per se invalid. It can be declared invalid only “in an action brought by the United States for the purpose of declaring such [State law, or the application of such a State law] invalid.” 19 U.S.C. § 3512(b)(2)(A). In such a case, “the United States shall have the burden of proving that the law that is the subject of the action, or the application of that law, is inconsistent with the agreement in question.” *Id.* at § 3512(b)(2)(B)(ii). According to the General Counsel of the United States Trade Representative, the United States has never brought an action against a state under 19 U.S.C. § 3512(b)(2).⁹

Social Affairs, Statistical Office of the United Nations, *Provisional Central Product Classification (Statistical Papers, Series M No. 77)* 76 (1991).

⁸Usually referred to as “reservations,” such limitations are common in multilateral agreements. Restatement § 313.

⁹Thus, an inconsistent state law is not preempted by the Supremacy Clause. *See* U.S. Const. art. I, § 10, cl. 3. The U.S. Schedule, including the reservation of any limitations on national treatment imposed by state law, constitutes the United States’ treaty obligation to its fellow GATS Members. If a state law limitation was left out of the U.S. Schedule, it is not subject to preemption, but to the remedial procedures set out in 19 U.S.C. § 3512(b).

Summary of analysis.

¶13. Against this background, I conclude that Wis. Stat. § 710.02(1) permits GATS Members and their service suppliers to acquire, own, or hold more than 640 acres of land for most service-related, non-agricultural, non-forestry uses enumerated in the GATS. There are two separate reasons for this conclusion. First, the acreage limitation prohibits the nonresident alien ownership of more than 640 acres for agricultural or forestry use, but exempts from this restriction most service-related uses of land by nonresident aliens. Second, the GATS comes within the statute's treaty exception. Thus, any possible conflict between the GATS requirements and the statutory restrictions would be subject to the treaty exception.

Wis. Stat. § 710.02 restricts land acquisition by nonresident alien service suppliers for agriculture and forestry, but not for most service-related uses.

¶14. The purpose of the acreage restriction in Wis. Stat. § 710.02(2) is to prevent the large-scale acquisition of Wisconsin land by nonresident aliens for agricultural or forestry purposes. Consistent with this limited reach, Wis. Stat. § 710.02(2) enumerates the non-agricultural, non-forestry activities to which the acreage restriction does not apply. Specifically, it does not apply to "[r]ailroad or pipeline corporations," or uses based on mining, manufacturing activities, mercantile activities, and exploration or production of potential fuel and energy sources. Wis. Stat. § 710.02(2)(c)-(g). Wisconsin's intent to open its land market for these activities but not agricultural and forestry purposes is spelled out in the legislative declaration of the 1983 Act (legislative intent is "to remove barriers to foreign investment in energy, mining, manufacturing and mercantile activities," while "continuing to limit alien ownership of land used for agricultural or forestry purpose to not more than 640 acres").

¶15. The statute defines the manufacturing and mercantile activities by reference to the *Standard Industrial Classification Manual* produced by the Office of Management and Budget. Wis. Stat. § 710.02(2)(e)-(f); *see supra* ¶ 5 & nn.5-6. These defined activities generally correspond to the business sectors and subsectors for which the United States has agreed to provide national treatment in its Schedule of Specific Commitments. *See supra* at ¶ 10. In my review, I found that nearly all the service sectors and subsectors in the Schedule are also listed in the *Manual* with one notable exception. "Services *Incidental* to Agriculture . . . and Forestry" are included in the U.S. Schedule but are not among the subsectors exempt from the acreage limitation under Wis. Stat. § 710.02(2)(e)-(f). *See supra* at

¶ 10. With these exceptions, nonresident alien service suppliers may freely acquire land in Wisconsin to use for any of the enumerated service-related purposes.

¶ 16. The statute prohibits nonresident alien land acquisition and ownership above 640 acres for agricultural or forestry purposes. The GATS does not require its Members to accord other Members or their service suppliers “national treatment” with respect to agricultural and forestry land acquisition and ownership. The only conceivable conflict between the statute and the GATS might arise if a Member or its service supplier sought to acquire more than 640 acres of land for a service incidental to agriculture, *e.g.*, animal boarding, or forestry, *e.g.*, timber evaluation.

GATS Members are exempt from the acreage limitation under the “treaty” exception.

¶ 17. To the extent they seek to enforce their rights under the GATS, GATS Members and their service suppliers are covered by the treaty exception in Wis. Stat. § 710.02(2)(b). Section 710.02(2)(b) exempts from the acreage limitation “[c]itizens, foreign governments or subjects of a foreign government whose rights to hold larger quantities of land are secured by treaty.” Whether the treaty exception applies to services and service suppliers of GATS Members depends on the answers to two subsidiary questions. First, is the GATS a “treaty” within the meaning of Wis. Stat. § 710.02(2)(b)? And, second, are GATS Members’ service suppliers “citizens” or “subjects of a foreign government” within the meaning of the statute? The answer to both questions is “yes.”

¶ 18. First, the GATS is a “treaty” under the statute. As the U.S. Supreme Court has recognized, the term “treaty” has more than one meaning. It may refer narrowly to Article II treaties or broadly to any international agreement recognized as binding under international law.

The word “treaty” has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force. Under the United States Constitution, of course, the word “treaty” has a far more restrictive meaning.

Weinberger v. Rossi, 456 U.S. 25, 29 (1982) (citation omitted); accord *United States v. Belmont*, 301 U.S. 324, 330 (1937); *B. Altman & Co. v. United States*, 224 U.S. 583, 600 (1912); *Black’s Law Dictionary* 1640 (9th ed. 2009). The “more

restrictive meaning” referred to is, of course, based on the Treaty Clause, which gives the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” U.S. Const. art. II, § 2, cl. 2.

¶19. The term “treaty” is not defined in Wis. Stat. § 710.02(2)(b), elsewhere in the Wisconsin statutes, or in Wisconsin case law. In this definitional vacuum, it is appropriate to adopt the understanding of the term from federal case law, which in turn relies on international customary law. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 685 (7th Cir. 2012). This approach is consistent with the general principle of statutory construction that an undefined statutory term well-known in the common law presumptively retains its common law meaning. *See id.* (international customary law is equivalent to Anglo-American common law); *In re Custody of D.M.M.*, 137 Wis. 2d 375, 389-90, 404 N.W.2d 530 (1987). Given their role in our federal system, the federal courts have substantial experience and expertise in the exposition of international customary law. *See* U.S. Const. art. II, § 2, cl. 2; 28 U.S.C. § 1331.

¶20. The U.S. Supreme Court has interpreted the term “treaty” to include executive agreements in two cases construing federal statutes. In *Weinberger*, it construed the following “treaty” exception in the Military Selective Service Act of 1967, which prohibited employment discrimination against American citizens in military facilities abroad:

“Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States.”

Weinberger, 456 U.S. at 27 n.3 (quoting 85 Stat. 355, note following 5 U.S.C. §7201 (1976 ed. Supp. IV); emphasis the Court’s). The question before the Court was whether a Base Labor Agreement negotiated between the United States and the Republic of the Philippines was a “treaty” that would allow employment discrimination against American citizens under the Act. The BLA was an “executive agreement” that had not been “submitted to the Senate for its advice and consent.” *Id.* at 32.

¶21. The Court held that the BLA came within the statute's treaty exception. *Id.* at 32. Noting the canon of construction that an ambiguous " 'act of congress ought never to be construed to violate the law of nations, if any other possible construction remains,' " the Court concluded that "some affirmative expression of congressional intent to abrogate the United States' international obligations is required in order to construe the word 'treaty' . . . as meaning only Art. II treaties." *Id.* at 32 (quoting *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804)).

¶22. In *B. Altman*, the Court decided that "treaty," as used in the Circuit Court of Appeals Act allowing direct Supreme Court review of cases involving " 'the validity or construction of any treaty,' " included a "commercial reciprocal agreement" negotiated between the United State and France "under the authority contained in § 3 of the Tariff Act of 1897." *B. Altman*, 224 U.S. at 594, 596 (citation omitted).

While it may be true that this commercial agreement . . . was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President.

Id. at 601.

¶23. Against this background, the term "treaty" in Wis. Stat. § 710.02(2)(b) should be interpreted as including the GATS, a Congressional-Executive agreement. *Cf. K.S.B. Techical Sales Corp. v. N. Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 778 (N.J. 1977) (concluding that the GATT, an executive agreement, was a "treaty" under the Supremacy Clause); *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App. 2d 803, 820 (Cal. Dist. Ct. App. 1962) (same); *Territory of Hawaii v. Ho*, 41 Haw. 565, 565 (Haw. Terr. 1957) (same). Significantly, Wis. Stat. § 710.02(2)(b) was adopted in 1983, just one year after *Weinberger* was decided.

See 2B N. Singer & J.D. Singer, *Sutherland Statutory Construction* 143 (7th ed. 2012) (“All legislation is interpreted in light of the common law . . . existing at the time of its enactment.”). The legislature presumably adopted the treaty exception with full knowledge of *Weinberger*’s broad interpretation of the term “treaty” and thus intended to incorporate the *Weinberger* Court’s interpretation of “treaty” when it used the term in constructing the 1983 amendments. See, e.g., *Strenke v. Hogner*, 2005 WI 25, ¶ 28, 279 Wis. 2d 52, 694 N.W.2d 296 (“The legislature is presumed to act with full knowledge of existing case law when it enacts a statute.”).

¶24. The GATS is analogous to the agreements at issue in *Weinberger* and *B. Altman*. It was “negotiated between the representatives of . . . sovereign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between [them].” *B. Altman*, 224 U.S. at 601. Like the statutes in those cases, the statute here contains no “affirmative expression of [legislative] intent to abrogate the United States’ international obligations.” *Weinberger*, 456 U.S. at 31-32. And, like the statute in *Weinberger*, Wis. Stat. § 710.02(2)(b) recognizes a treaty exception to the enforcement of a general statutory proscription. *Id.* Construing the GATS to be a “treaty” is consistent with the canon that an ambiguous “act of congress ought never be construed to violate the law of nations if any other possible construction remains.” *The Charming Betsy*, 2 Cranch at 118. The fact that the law here is an act of the Wisconsin legislature rather than of Congress reinforces the conclusion: unlike the U.S. Congress, a state legislature has no authority to interfere in international agreements. See *Belmont*, 301 U.S. at 331 (“To counteract [an international compact] by the supremacy of the state laws, would bring on the Union the just charge of national perfidy. . . .”) (internal quotation marks and citation omitted); accord *United States v. Pink*, 315 U.S. 203, 230-34 (1942).

¶25. This interpretation is consistent with the Wisconsin legislature’s expression of intent regarding 1983 Wis. Act 335, § 1: “The legislature recognizes the need to modify this state’s restrictions on land ownership by nonresident and foreign business corporations and entities, so as to remove barriers to foreign investment in energy, mining, manufacturing and mercantile activities.” The liberalizing intent of this declaration would be stymied by a restrictive interpretation of the word “treaty” as limited to Article II treaties.

¶26. I also conclude that the service suppliers of GATS Members are protected by the treaty exception to the extent that they seek to acquire, own, or hold land for service-related uses enumerated in the U.S. Schedule. The treaty

exception exempts “[c]itizens, foreign governments or subjects of a foreign government” from the acreage limitation. Wis. Stat. § 710.02(2)(b). The exception clearly applies to individual nonresident aliens, who are, by definition, either “[c]itizens . . . or subjects of a foreign government.” Less obvious is whether the exception applies equally to corporations, limited liability companies, partnerships, associations, and trusts.¹⁰ The U.S. Schedule guarantees “national treatment” to all GATS Members and their service suppliers. Under the GATS, “ ‘service supplier’ means any *person* that supplies a service.” GATS art. XXVIII(g). “ ‘[P]erson’ means either a natural person or a juridical person.” *Id.* at (j). “ ‘[J]uridical person’ means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.” *Id.* at (l). The question is whether the “citizen or subject” terminology of Wis. Stat. § 710.02(2)(b) includes these “juridical persons.”

¶27. Corporations are generally considered legal “persons” under federal and state law. *See, e.g., Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819); Wis. Stat. § 990.01(26); § 180.0302. The same is true of limited liability companies, partnerships or associations. Wis. Stat. § 178.01(2)(e); *accord* 1 U.S.C. § 1; Wis. Stat. § 990.01(26). A corporation created under the laws of a foreign nation is deemed a *citizen* or *subject* of that nation. *See* 28 U.S.C. § 1332(c)(1); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91-92 (2002); *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 42-43 (Feb. 5). The question is most often litigated in federal diversity cases. *See, e.g., JPMorgan*, 536 U.S. at 91-92; *see also* 28 U.S.C. § 1332(a)(2) (federal courts have jurisdiction over civil actions between “citizens of a State and *citizens or subjects* of a foreign state”).

¶28. Despite this general approach, the meaning of the terms “citizen” and “subject” must nevertheless be determined independently in each individual statute. The interpretation of these words in a particular act “depends upon the intent, to be gathered from the context and the general purpose of the whole legislation in which it occurs.” *Swiss Nat’l Ins. Co. v. Miller*,

¹⁰The acreage limitation applies to nonresident aliens and corporations not created under federal or state law; corporations, limited liability companies, partnerships or associations with more than twenty percent ownership by nonresident aliens or corporations; and trusts with more than twenty percent of their assets held for the benefit of nonresident aliens or foreign corporations. Wis. Stat. § 710.02(1)(a)-(c).

267 U.S. 42, 46 (1925) (citations omitted); *see also Vill. of Tigerton v. Minniecheske*, 211 Wis. 2d 777, 783-84, 565 N.W.2d 586 (Ct. App. 1997).

¶29. I conclude that the phrase “[c]itizens ... or subjects of a foreign government” in Wis. Stat. § 710.02(2)(b) includes all “juridical person[s]” “duly constituted or otherwise organized” under the laws of GATS Members. GATS art. XXVIII(1). Given its statutory context, a broad construction of the citizen or subject language clearly comports with the expressed legislative intent “to remove barriers to foreign investment in energy, mining, manufacturing and mercantile activities.” 1983 Wis. Act 335, § 1. Furthermore, like the term “treaty,” this language should be interpreted pursuant to the principle that ambiguous statutes should be construed to accord with “the law of nations.” *The Charming Betsy*, 2 Cranch at 118. The construction that best comports with the GATS is the one that broadly equates citizens and subjects with all juridical persons. Meanwhile, the Wisconsin language is very close to the language of the federal diversity statute, which unquestionably treats foreign corporations and other juridical persons as citizens of their place of incorporation or principal place of business. *Compare* Wis. Stat. § 710.02(2)(b) with 28 U.S.C. § 1332(a)(2) and (4).

* * * * *

¶30. I conclude that Wis. Stat. § 710.02(1) is generally inapplicable to GATS Members, their services, or their service suppliers to the extent they seek to acquire, own, or hold land for service-related uses enumerated in the U.S. Schedule. First, Wis. Stat. § 710.02(2) does not limit land acquisition by nonresident aliens and foreign corporations for most service uses to which the United States agreed to provide national treatment under the GATS. On the contrary, the statutory acreage limitation applies to agricultural or forestry uses only. Second, the treaty exception in Wis. Stat. § 710.02(2)(b) applies to GATS Members, their services, and their service suppliers.

Sincerely,



J.B. VAN HOLLEN
Attorney General



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

December 30, 2014

OAG—12—14

Director of State Courts Office
Post Office Box 1688
Madison, WI 53701

Dear Sir or Madam:

¶ 1. Former Director of State Courts A. John Voelker asked if the clerk of circuit court or the register in probate may properly charge a statutory fee for copies of court documents when the requester makes copies using his or her own technology, such as a camera phone or handheld scanner. The question implicates Wis. Stat. §§ 814.61(10)(a) and 814.66(1)(h)1., which direct the clerk of court and register in probate to collect \$1.25 and \$1.00, respectively, for “copies.” The question also implicates the public-records law, which permits authorities such as the courts to charge only “the actual, necessary and direct cost of reproduction” unless a different fee is “specifically established” in the statutes. Wis. Stat. § 19.35(3)(a).

¶ 2. I conclude that the term “copies” in Wis. Stat. §§ 814.61(10)(a) and 814.66(1)(h)1. includes the use of technologies such as a camera phone or handheld scanner. The statutes, however, do not authorize the collection of fees when a requester makes the copies using those devices with no aid from the clerk or register. The court clerk and register are the authorities holding the records. These officials thus control the method of copying and may choose whether to allow a person to make copies with a personal device.

¶ 3. The first issue is the scope of the term “copies” in Wis. Stat. §§ 814.61(10)(a) and 814.66(1)(h)1. Interpretation of a statute begins with the statutory language and its “ordinary” meaning. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*, ¶ 46. The clerk-of-court statute orders a clerk to collect fees for “copies”:

In a civil action, the clerk of court shall collect the fees provided in this section. . . . *The clerk shall collect the following fees:*

....

(10) COPIES. (a) Except as provided in par. (b), *for copies*, certified or otherwise, of any document for which a specific fee is not established by this section, or for comparison and attestation of copies not provided by the clerk, *\$1.25 per page*.

(b) For copies of any court document requested by the state public defender, other than a transcript, a fee equal to the actual, necessary and direct costs of copying.

Wis. Stat. § 814.61(10). The register-in-probate statute contains the same language, albeit with a smaller fee: “The register in probate shall collect the following fees: . . . for copies . . . \$1 per page.” Wis. Stat. § 814.66(1).

¶ 4. The ordinary meaning of the word “copies” is broad. Dictionaries state that a “copy” is defined by its similarity to the original, not by the technology with which it was created. For example, the dictionary definition of “copy” has long been “an imitation, transcript, or reproduction of an original work.” *Webster’s Third New International Dictionary* 504 (1986). Similarly, the contemporary online dictionary definition states that a “copy” is “something that is or looks exactly or almost exactly like something else: a version of something that is identical or almost identical to the original.”¹ Black’s Law Dictionary defines “copy” as “[a]n imitation or reproduction of an original.” *Black’s Law Dictionary* 385 (9th ed. 2009). A camera-phone image of a document (assuming it was competently captured) looks “almost exactly like” the original document.

¶ 5. In other contexts, the legislature has demonstrated that it understands “copy” to have a meaning broader than “photocopy.” In 2013 Wis. Act 171, the legislature substituted the word “copy” for “photocopy” in a public-records-law provision, Wis. Stat. § 19.35(1)(b), in an effort to broaden its meaning:

Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. If a requester appears personally to request a copy of a record that permits ~~photocopying~~ copying, the authority having custody of the record may,

¹Merriam-Webster, <http://www.merriam-webster.com/dictionary/copy> (last visited September 24, 2014).

at its option, permit the requester to ~~photocopy~~ copy the record or provide the requester with a copy substantially as readable as the original.

2013 Wis. Act 171, § 10 (revising Wis. Stat. § 19.35(1)(b)). A note to the Assembly Bill explained the change: “*Broadens* application of the right to photocopy or receive a photocopy of a record to apply *to other forms of copying*.” 2013 Assembly Bill 567, § 10 (Wis. 2014), Note (emphasis added). Thus, the legislature understands the word “copy” to be broader than “photocopy,” and to include other “forms” of reproduction.

¶ 6. Courts also endorse that ordinary meaning. For example, in the public-records context, the Wisconsin Court of Appeals has described the act of taking digital photographs of a court document as “to copy.” *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 6, 9, 14, 240 Wis. 2d 551, 624 N.W.2d 892; *see also United States v. Hampton*, 464 F.3d 687, 690 (7th Cir. 2006) (discussing “a photocopy (or equivalent chemical or electronic copy)”).

¶ 7. In sum, dictionary definitions, the use of the term in other statutes, and court decisions all treat the word “copies” as including the electronic capturing of a document with technologies such as a handheld scanner or camera phone.²

¶ 8. The second question is whether the statutes contemplate a fee when the copy is not made with the assistance of the clerk or register, but rather is accomplished by an individual with his or her personal device. While Wis. Stat. §§ 814.61(10)(a) and 814.66(1)(h)1. include the term “copies” as items for which the clerk or register, respectively, may charge fees, the statutes are silent as to what action, if any, the clerk or register must take to charge the copy fees. Notably, the statutes list other types of fees, and all of them involve services that implicitly require some action by the clerk or register. The other clerk fees listed in Wis. Stat. § 814.61 involve opening a case, filing something in the court record, transferring files to another court, issuing something (such as a certificate), or administering a process (such as calling a jury). *See* Wis. Stat. § 814.61(1)-(14) (addressing

²The public-records law does contain one subsection that seems to differentiate between a “copy” and a “photograph,” but that subsection does not have general application. It applies only in the rarer circumstance where the record is something that “does not permit copying.” Wis. Stat. § 19.35(1)(f). For the reasons discussed above, I conclude that when it comes to documents amenable to copying there is no line to be drawn between a photocopy and digital capturing of that document via a handheld scanner or camera phone.

commencement of actions, including petitions for revisions, judicial review, and support and maintenance; requests for change of venue; filing of third-party complaint; jury; issuing “executions, certificates, [etc.]” and filing and entering judgments; filing foreign judgments; transmitting documents; searching for files when no case number provided; receiving/disbursing money). All of these subsections require an action that the clerk exclusively performs, but none expressly state that the clerk is the official taking the action. The same pattern is found in the register in probate statute. Wis. Stat. § 814.66(1)(a)-(n).

¶ 9. When an individual makes a copy using his or her own personal technology, no action by the clerk or register is required. A person may request that a clerk retrieve a file for inspection, and may then examine that file on the premises.³ While inspecting, if that person decides to copy a page using a camera phone or handheld scanner, it would require no additional action by the clerk in making copies, maintaining copying equipment, or otherwise aiding the requester. Statutory language is interpreted consistent with the language of closely-related statutes and to avoid absurd or unreasonable results. *See State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 46. Charging a fee when the clerk or register does nothing to make a reproduction is inconsistent with the other items on the list. Indeed, were the statute to be interpreted otherwise, then the clerk of courts could charge an individual for a copy made from the first copy, even if done away from the clerk’s office.

¶ 10. This interpretation is consistent with other similarly-structured fee statutes in Wisconsin. For example, Wis. Stat. § 165.82 provides for a criminal history search fee. It states that the Wisconsin Department of Justice “shall impose the following fees” and then provides: “For each record check . . . \$7.” Wis. Stat. § 165.82(1)(am). In a similar manner, Wis. Stat. § 814.70(1) provides that sheriffs “shall collect” certain fees and then states: “For each service or attempted service of a summons . . . \$12 for each defendant or person.” Like the clerk and register fee provisions, these provisions specify who collects the fee and then provide the fee amount without further reference to an actor. The reasonable reading of these provisions is that the fees apply only when the Department of Justice performs the criminal history check or when the sheriff’s office achieves or attempts service, as opposed to some other entity or person taking these actions. Otherwise, the statutes

³The statute would impose a separate fee for searching “when the person requesting the search does not furnish the case number of the action,” which is not at issue in this opinion. *See* Wis. Stat. § 814.61(11).

would lead to the absurd result of, for example, paying a fee to the Department of Justice for a background check performed by a private company. This reasoning applies with equal force to the clerk and register fee provisions.

¶ 11. Indeed, a New Jersey appellate court came to that conclusion when addressing New Jersey's similar fee provision for copies from a clerk. In *Dugan v. Camden County Clerk's Office*, 870 A.2d 624, 626 (N.J. Super. Ct. App. Div. 2005), the court addressed a New Jersey statute that authorized the clerk to charge a fee for: "Copies of all papers . . . \$2.00." As with the relevant Wisconsin laws, the court explained that New Jersey's fee provision was listed together with other items that required the clerk to provide a service. *Id.* The court concluded that, consistent with those other provisions and with the "language itself" suggesting "the performance of an active service," the copy fee applied only "if the clerk physically makes the copy." *Id.* at 627-28.

¶ 12. Thus, Wis. Stat. §§ 814.61(10)(a) and 814.66(1)(h)1. do not include fees for copies made without assistance from a clerk or register.

¶ 13. The public-records law allows a separate fee for a record only when that fee is "specifically established." Wis. Stat. § 19.35(3)(a). Because Wis. Stat. §§ 814.61(10)(a) and 814.66(1)(h)1. are silent as to whether fees apply to copies made by others, those provisions do not "specifically establish" fees for such copies within the meaning of Wis. Stat. § 19.35(3)(a). I conclude that the fee provisions do not apply to copies made by a private person with his or her own technology, such as a handheld scanner or camera phone.⁴

¶ 14. While the custodian of court records may not charge an individual for using a cell phone camera to capture a copy of a court document, the custodian of court records may choose the method of copying and need not allow individuals to make their own copies. In *Grebner*, a requester sought to make copies at a county clerk's office with his own portable copy machine. 240 Wis. 2d 551, ¶ 1. The county clerk refused and offered to instead have her office make the copies for a fee. *Id.* ¶ 4. The clerk also would have permitted the requester to make the copies himself with a digital camera as long as it would not damage the documents. *Id.* ¶ 6. The court of appeals concluded that the requester needed the clerk's permission to use his own equipment to copy records. *Id.* ¶ 9. Interpreting Wis. Stat. § 19.35(1)(b), the court

⁴This opinion addresses only the situation where the clerk or register is in no way involved in producing a copy. There may be situations where a clerk or register might aid a requester when that person makes copies using technology such as a handheld scanner or camera phone. Potential variations along those lines are not addressed in this opinion.

held that the public-records law “gives *the clerk* the option of allowing the requester to copy the records with the requester’s own equipment or providing the requester with a copy of the records.” *Id.* ¶ 7 (emphasis added); *see also id.* ¶¶ 12-13 (further explaining that the law “does not require the custodian to articulate or explain the reasons for his or her decision”).

¶ 15. Accordingly, the custodian of court records may choose whether to allow someone to make his or her own copies with personal technology. If the decision is to allow a person to perform that copying unassisted, then the fees in Wis. Stat. §§ 814.61(10)(a) and 814.66(1)(h)1. do not apply.

¶ 16. In sum, I conclude the term “copies” in Wis. Stat. §§ 814.61(10)(a) and 814.66(1)(h)1. includes copies made with the use of technologies such as a camera phone or handheld scanner. Those statutes, however, do not authorize fees for copies made by a requester using a personal device with no assistance from the clerk or register. The court clerk and the register may choose whether to allow an individual to make copies in this manner.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBV:ADR:mlk